

David Whitaker, Esq.  
Director

Irvin Corley, Jr.  
Executive Policy Manager

Marcell R. Todd, Jr.  
Senior City Planner

LaKisha Bardclift, Esq.  
Rory Bolger, PhD

# City of Detroit


## CITY COUNCIL

LEGISLATIVE POLICY DIVISION  
208 Coleman A. Young Municipal Center  
Detroit, Michigan 48226

Phone: (313) 224-4946 Fax: (313) 224-4336

Elizabeth Cabot, Esq.  
Janese Chapman  
Derrick Headd  
Anne Marie Langan  
Jerry Pokorski  
Analine Powers, PhD  
Sabrina Shockley  
Thomas W. Stephens, Esq.  
David Teeter  
Kathryn Underwood

TO: The Honorable City Council

FROM: David Whitaker, Director   
Legislative Policy Division Staff

DATE: October 14, 2014

RE: Community Benefits Agreements Policy Debate

*"How have the issues been framed? Can issues of equitable development, the positive prospects for the community, and the ability to create a win-win situation be emphasized to attract more community members and positive press attention?"*

- "Understanding Community Benefits Agreements," by Patricia E. Salkin and Amy Lavine (2008) (attached, p. 329)

*"I think it will be the most damaging piece of legislation that the city can have."*

- The new Detroit Economic Growth Corp. (DEGC) CEO Rodrick Miller (10/7/14)  
(<http://www.freep.com/story/money/business/columnists/tom-walsh/2014/10/07/detroit-development-ordinance/16857551/>)

### Introduction

City Council has been presented with two alternative versions of an ordinance requiring Community Benefits Agreements (CBA), where (and only where, it should be emphasized) large developers seek public subsidies for their projects.<sup>1</sup> The two versions were compared and contrasted by attorneys from the Law Department and LPD, respectively, at the Planning and Economic Development Standing Committee meeting on October 9, 2014.

---

<sup>1</sup> Significantly, what is technically required of such a major developer seeking public subsidies is engagement with community for the purposes of such a Community Benefits Agreement, not an absolute requirement that the developer sign an agreement. A good cause exception covers situations where such an agreement is impractical, unwanted by community or impossible to negotiate for reasons beyond the developer's control. LPD would note the level of importance City Council has attached to this CBA ordinance effort, as it emerged as a top legislative agenda initiative from the September legislative retreat.

In this report, LPD seeks to provide Council with a balanced discussion of the underlying policies and objectives of such agreements, as a predicate for consideration of proposed local legislation requiring them, under defined circumstances.

In a previous report addressing the Mayor's proposed "Neighborhood Development Agreement," dated September 5, 2014, LPD provided the following initial summary of some of the key issues around Community Benefits Agreements:

"The community benefits model is a strategy that works in the United States economic and social context. Community benefits work changes major development projects through community organizing, applied research, legal mechanisms, and alliance-building. Through a community benefits agreement between impacted communities and developers, communities can achieve:

- Access to job training and job opportunities created by the project
- For local small businesses, access to service and supplier contracts let on the project
- Environmental protections from health risks created by construction and project activities such as diesel exhaust, dust and other health risks
- Minimized housing and local business displacement
- Sustainable practices on the project leading to improved quality of life and empowerment of the local community
- Other improvements targeted to the goals of the particular project and needs of the involved community." (Sugar Law Center)

A coalition of national community benefits advocates further explains: "Community Benefit Agreements (CBAs) — deals between developers and coalitions of community organizations, addressing a broad range of community needs — are safeguards to ensure that affected residents share in the benefits of major developments. They allow community groups to have a voice in shaping a project, to press for community benefits that are tailored to their particular needs, and to enforce a developer's promises. CBAs are only one aspect of a growing new movement towards community benefits in land use planning, taking shape through labor-community partnerships around the country." (Good Jobs First) CBAs are somewhat akin to the "Smart Growth" movement, linking investment and economic development activities to a broad range of socially desirable measures aimed at enhancing quality of life in "livable communities."

This report will provide a more in-depth view of Community Benefits Agreements, to assist in Council's anticipated discussions of the proposed ordinance.<sup>2</sup>

---

<sup>2</sup> As noted by LPD in the September 5 report, some sources for additional information about community benefits agreements include the following:

1. Wikipedia: [http://en.wikipedia.org/wiki/Community\\_Benefits\\_Agreement](http://en.wikipedia.org/wiki/Community_Benefits_Agreement)
2. Partnership for Working Families: <http://www.forworkingfamilies.org/resources/policy-tools-community-benefits-agreements-and-policies>
3. Maurice & Jane Sugar Law Center: <http://www.sugarlaw.org/projects/community-economy-justice/stronger-michigan-communities/>
4. Good Jobs First (with others): <http://www.goodjobsfirst.org/sites/default/files/docs/pdf/cba2005final.pdf>
5. Community Development Advocates of Detroit (CDAD): <http://cdad-online.org/community-benefits-agreements/>

## **History of Community Benefits Agreements**

The attached law review article, quoted at the beginning of this report, concisely summarized the recent history of Community Benefits Agreements as of 2008:

“The CBA movement was born in the late 1990s as a mechanism for community groups to organize and work collaboratively to communicate and negotiate directly with developers. CBAs allow community groups to address a multitude of community impacts and opportunities that the host municipality may not have legal authority and/or the political will to discuss otherwise. Usually framed as private agreements (with or without municipal involvement), CBAs may require a developer to mitigate potential impacts of the development. But often they go even farther, asking the developer to work with the community to improve housing, employment options, and recreational and cultural facilities. As a result, CBAs can empower communities to become active participants in the planning process. Because of their potential to improve communities’ quality of life, CBAs are becoming increasingly popular.”

More recently in Michigan, the attached September/October 2014 issue of Michigan Planner touched on the national history of such agreements, and reported the status of some Community Benefits Agreement conversations currently ongoing in Detroit, including the proposed ordinance:<sup>3</sup>

“From Los Angeles to New York City and from New Orleans to Minneapolis-St. Paul, community advocates from across the country are organizing and engaging in the development process at a high level to benefit their neighborhoods and hold projects to higher standards. Often times, the result is a contract between a community and a developer, especially in cases where large projects take advantage of public resources, such as tax abatements and public financing. ... The community benefits movement began over a decade ago [now almost two decades – LPD] in cities across the country in response to increasing numbers of heavily subsidized projects that were underwritten by taxpayer dollars, but offer little positive benefit for its host community and minimal community engagement. ... Since the 1990s, dozens of CBAs have been successfully negotiated across the country in cities experiencing a wide range of market conditions and development pressures.”

## **Community Benefits Agreements; Policy Issues**

The Michigan Planner article identifies the following core components of a CBA:

“While each CBA may be different, at their most basic level, CBAs seek to elevate three core concepts. The first is to maximize inclusiveness in the process to allow many aspects of the community to be represented. The second is to outline a scope of enforceability for the

---

<sup>3</sup> The article specifically notes that “... the Detroit ordinance may be the first local legislation to comprehensively require CBAs that are negotiated between community representatives and the developer.” As noted above, this may be somewhat misleading, as both the current proposed ordinances in fact require engagement with community for the purposes of such a Community Benefits Agreement, not an absolute requirement that the developer sign an agreement. See the “good cause” exception, noted at footnote 1 above.

developer and project. And the third is to hold government accountable, so that people have a voice about how public dollars are spent on development projects in their communities. ... A community benefits program consists of a set of effective tools and policies that produce “win-win” outcomes for all stakeholders through equitable partnerships with host communities and accountable development standards for creating good jobs and improving the quality of life in impacted neighborhoods. ... The negotiation process allows for more proactive and collaborative community engagement and can address a wider range of concerns than is possible in traditional land-use and economic development decision-making by local governments.”

The attached working paper from 2010 agrees that “CBAs may give neighborhoods a more meaningful role in the development process than the opportunities the existing land use process provides for public participation. ... neighborhoods wishing to have a more significant role in the land use process see CBAs as a more direct and powerful way for residents to shape their neighborhood’s development. ... The normal land use process does not necessarily ensure that those most affected by a development proposal will receive their fair share of the benefits of the development.”

As Council knows, two successive leaders of the Detroit Economic Growth Corporation (DEGC) have publicly expressed opposition to the proposed ordinance in strong terms. Recently, in the letter and newspaper interview quoted at the beginning of this report, the new CEO of DEGC indicated that such an ordinance is unnecessary because there are existing tools which, with better enforcement, can achieve the same objectives; also that there are other plans being developed by the administration toward these ends.<sup>4</sup> At minimum, Council should hear from the DEGC and/or the Mayor what they refer to as such tools, and their plans to better enforce the existing tools. If there are any such tools and plans, this should be communicated to Council and the public. In addition, Council may wish to ask what the new DEGC director means by asking “isn’t it more cost effective to lower these barriers?” What barriers is he referring to that should be lowered, and how? To the extent this refers to the zoning process and its traditional tools, such as development agreements between the developer and the local government, as noted above they are generally not considered to be adequate substitutes for more flexible, community-oriented CBAs. In the zoning process, legal restrictions such as the “substantial nexus” requirement (see, e.g., brief discussion of the *Nollan* and *Dolan* U.S. Supreme Court cases below), due process and other substantive limitations on what the City can legitimately demand by way of a development agreement, constrain the benefits to the community. Perhaps even more important, these traditional zoning tools lack the critical community involvement and empowerment features of CBAs.

Principled criticisms of CBAs have included a potential or actual lack of adequate representation of the affected community: The attached Working Paper states “One of the most common

---

<sup>4</sup> Even more recently, the Detroit News – also relying almost exclusively on a single letter written by the new head of DEGC – characterized the proposed ordinance as a “shakedown tax.” (<http://www.detroitnews.com/story/opinion/editorials/2014/10/11/benefits-agreement-detroit-development/17056019/>) LPD’s efforts to find any scholarly, analytical discussion of the topic of Community Benefits Agreements that supports the position expressed by Mr. Miller were not fruitful.



criticisms leveled at CBAs is that the agreements may not represent the wishes of the majority of the community. ... in most cases, the people who negotiate CBAs are neither elected nor appointed by the community or its elected representatives.” This can result in lack of accountability, poor process (including lack of due process), and even conflicts of interest – potentially involving developers allying with one or more groups against others.<sup>5</sup> “These gaps give rise to a fear that developers will use CBAs as part of a divide and conquer strategy to ‘buy’ off a few community activists in order to create the impression of broader community support than actually exists.”

Another legitimate concern involves the potential of CBAs to foster what the working paper refers to as distorted “Neighborhood-by-Neighborhood Solutions to Problems That Would Better Be Addressed on a Citywide Basis.” That certainly would be an undesirable outcome that should be guarded against. Passing an ordinance, requiring CBAs for major development projects supported by significant public subsidies on a City-wide basis, can be considered a step toward addressing this issue, which otherwise is posed by leaving the initiation of all CBAs to each individual community group. As noted in the attached book chapter regarding CBAs, “Rather than having all parties fight these battles on a project-by-project basis, a better solution would be to have local governments establish a slate of community benefits policies governing all large urban development projects, at least when subsidies are being provided.” The proposed ordinance seeks to achieve this, but it would not completely eliminate the risk that local host communities might gain, through a CBA process, some of what the City as a whole could otherwise expect to receive. As Council Members recently debated regarding community benefits for the Delray community in connection with the NITC, balancing such neighborhood and city-wide foci of community benefits is an issue that will have to be confronted if meaningful CBAs are to become an accepted part of economic development in Detroit.

### **Community Benefits Agreements; Preliminary Legal Issues**

There have been no significant published legal opinions to date testing the legal validity of a negotiated CBA. Moreover, the essentially “comprehensive” ordinance at issue – albeit with the opportunity for a developer to exempt its project for cause (see footnotes 1 and 3, above), appears to be unique. Therefore, any legal analysis is at this point tentative and even somewhat

---

<sup>5</sup> Both the attached law review article and the working paper hold up the example of the Atlantic Yards CBA process in New York City, home of the Brooklyn Nets professional basketball team, as one where the host community representative did not adequately represent the full range of the host community’s interests, at least partly because of the extensive over-involvement of both the developer and local officials in the community’s organization. This concern is a major reason for the alternative ordinance drafted by LPD, in consultation with President Jones and Council Member Castaneda-Lopez, largely removing the City of Detroit from the process, and leaving the negotiation of a CBA primarily to the developer and self-organization by the community’s advocates. The LPD version of the proposed ordinance deletes - among other unwieldy and over-involved provisions of the first draft – a requirement that the local district Council Member where the development is located convene, within seven (7) days, a community benefits coalition. Creating such a body that is truly diverse and representative of all affected groups in the community within that time frame would be impossible as a practical matter, inherently divisive, and would render the proposed ordinance unworkable.

conjectural. But it is nevertheless valuable to consider some legal arguments that may foreseeably be asserted in possible court challenges.

The attached law review article expressly notes that CBAs are not a panacea for all community economic development issues and challenges, and there are challenging legal obstacles to their negotiation and implementation:

“While CBAs are ardently supported by many stakeholders as a tool for obtaining amenities that might otherwise be unavailable, it should not be assumed that they are always ideal vehicles to promote social justice issues. Practical problems—from organizing coalitions of community groups to negotiating with legally and politically sophisticated developers—sometimes combine to make the process of negotiating a successful CBA an unwieldy exercise. Moreover, CBAs have yet to stand the test of judicial review. When they do reach the courts, they will undoubtedly raise numerous issues of contract validity and interpretation. Additionally, where municipalities may be a party to the CBA and/or may give administrative or legislative validity to a privately negotiated agreement, delegation and enforcement issues are likely to arise.”<sup>6</sup>

Similarly, the attached working paper, while providing a generally favorable overview of CBAs - at least where they “are negotiated through processes designed to ensure the transparency of the negotiations, the representativeness and accountability of the negotiators, and the legality and enforceability of the CBAs terms” – also flags several potentially problematic legal objections. One prominent issue it raises is proportionality. The US Supreme Court has imposed an “essential nexus” requirement linking the proposed development and legitimate state interest, and requiring that the amount of the benefit the government seeks be roughly proportional to the impact of the particular development. See, e.g., *Nollan v California Coastal Comm.*, 483 US 835 (1987); *Dolan v City of Tigard*, 512 US 374 (1994). LPD’s proposed draft of the Community Benefits Agreements ordinance includes language requiring that benefits “approximate the value of the public support for the project.” As the Working Paper notes, the CBA process may allow neighborhoods to negotiate mitigation and benefits measures without running afoul of requirements like those imposed by the *Nollan* and *Dolan* cases.<sup>7</sup>

---

<sup>6</sup> One of the major issues specifically referenced in this article is whether or not state law authorizes a development agreement between the developer and local government, which the terms of a CBA can be incorporated into, thus aiding enforceability. LPD is unaware of any obstacle under Michigan law to such procedures, which were specifically discussed in the CBA working Group this summer, and which will be included in the forthcoming latest revision.

<sup>7</sup> *Nollan* and *Dolan* have been limited to land use decisions that condition approval of development on the dedication of property to public use. *City of Monterey v Del Monte Dunes*, 526 US 687, 702 (1999); *MHC Financing Limited Partnership v City of San Rafael*, 2006 US Dist LEXIS 89195 (ND Cal 2006). Whether or not either a particular CBA, or an ordinance requiring them under specified circumstances, conditions approval of development on dedicating property to public use is one of those untested legal issues that would depend on, among other things, the particular provisions of the ordinance and/or agreement at issue.

In light of these and other potential legal issues, LPD concurs with the statement of Corporation Counsel, at the Planning and Economic Development Standing Committee meeting on October 9, 2014, that the proposed ordinance must receive thorough legal review.

### **Conclusion**

Whether or not a version of the proposed Community Benefits Agreements Ordinance should be adopted because it will be a positive contribution to economic development policy in the City of Detroit, or alternatively rejected because it would not be, is an issue that deserves to be thoroughly debated, in an atmosphere of mutual respect, intellectual integrity and based on facts and fair-minded analysis, rather than aggressive and irresponsible partisan rhetoric. It is hoped that this report will help elevate and reframe such a debate for the benefit of Council, community, developers and all interested stakeholders. LPD intends to provide Your Honorable Body with a revised draft ordinance, after further staff review that of course will then be open to input from all Council Members and other interested parties, within approximately one week.

If Council has any additional questions or concerns regarding this matter, LPD would be pleased to provide further research and analysis and report back regarding same.

# Community Benefits Agreements

Making Development Projects Accountable

*by*

**Julian Gross**

*Legal Director,  
California Partnership for Working Families*

*with*

**Greg LeRoy**

*of Good Jobs First*

*and*

**Madeline Janis-Aparicio**

*of LAANE*

*published by*

**Good Jobs First**

*and the*

**California Partnership for Working Families,**

*a collaboration of*

**the Center on Policy Initiatives,  
the East Bay Alliance for a Sustainable Economy,  
the Los Angeles Alliance for a New Economy,  
and Working Partnerships USA.**

© Copyright 2005 Good Jobs First and the California  
Partnership for Working Families.

All Rights Reserved.

# Introduction

---

## **The Community Benefits Movement and CBAs**

Community Benefit Agreements (CBAs) — deals between developers and coalitions of community organizations, addressing a broad range of community needs — are safeguards to ensure that affected residents share in the benefits of major developments. They allow community groups to have a voice in shaping a project, to press for community benefits that are tailored to their particular needs, and to enforce developer's promises. CBAs are only one aspect of a growing new movement towards community benefits in land-use planning, taking shape through labor-community partnerships around the country.

We have updated and revised this publication to share our experience in implementing some of

the CBAs described in the original edition. We have added extensive material in this preface on the community benefits movement; a new chapter describing implementation of the landmark CBA for the Staples development in Los Angeles; a new appendix listing past CBAs; a new appendix describing some current community benefits campaigns; and several new sections on legal issues, community benefits victories, and new approaches. We have also included an overview of the recent CBA for the Los Angeles International Airport, providing for community benefits valued at over half a billion dollars, and a special section on unusual legal aspects of this CBA.

## **The Economic Development Context**

Over the past decade, a growing number of cities across the country have pinned their hopes for renewal on ambitious and expensive economic

development programs accomplished through public/private partnerships. By the late '90's, states, counties and cities were spending close to \$50 billion per year on these programs, reflecting a deepening reliance on these partnerships to fuel economic growth. Sports stadiums, entertainment arenas, hotels, office parks, "big box" retail outlets, upscale residential projects and other such developments are increasingly being built with public money in cities all around the country.

The new emphasis on aggressive economic development is closely linked to the "back to the city" phenomenon. For the first time in decades, many large U.S. cities are experiencing population increases, with growing populations of both middle-class "urban pioneers" and Latin American and Asian immigrants taking up residence in urban neighborhoods.

Local government has played a central role in the push for urban economic development. As the federal government has slashed its contribution to urban budgets, and devolution has shifted programs like workforce development and housing construction away from federal and state governments, responsibility for major decisionmaking on urban development is landing in the laps of elected officials and staff at the city and county level.

Unfortunately, the public-private partnerships at the local level are being driven for the most part by the private sector. Although most city and county governments have "planning components," these departments expend most of their resources on the processing of permits and other land use applications. Local governments, eager to expand their tax bases and presented with little meaningful information about the costs and benefits of their choices, often see their role as being limited to facilitating the visions and plans of developers—rather than facilitating a public vision and plan developed with the input of a wide range of stakeholders. They often rely on the job creation projections of developer, but

after construction they have little information about actual jobs created. Standards for assessing the costs and benefits of development for communities, if such standards exist, are generally applied on an inconsistent and piecemeal basis.

Therefore, while economic development projects are often heavily subsidized by taxpayer dollars, they produce decidedly mixed results for city dwellers. While many of these projects bring sorely needed jobs and tax revenues back to areas that have been disinvested, there is usually no guarantee that the "ripple effects" of the projects will benefit current residents. Many new developments cause inner-city gentrification, pushing out low-income residents as housing prices rise. Other projects create large numbers of dead-end low-wage retail and service sector jobs, leaving low income, families, mostly people of color, mired in an endless cycle of poverty. While some Smart Growth proponents have advanced the notion that development should be governed by the "Three E's"—the economy, the environment, and equity—few if any jurisdictions have pursued "growth with equity" policies in a systematic way. Consequently, even after investing billions of dollars in economic development, metropolitan regions continue to experience spiraling poverty, sprawling, unplanned growth, a crisis of affordable housing and declining quality of life for low and middle-income communities.

Large-scale expenditures on economic development therefore present a host of questions for local government. What is the role of the public sector in guiding urban growth? What information is needed for local governments and community stakeholders to make informed choices about economic development? How can communities take advantage of nearly \$50 billion in annual investment in local economies to address growing inequality and urban poverty and create a renaissance in urban areas across the country? What conditions or performance measures should be attached to public subsidies and major land use

entitlements? What are the goals of economic development? Is it desirable to maximize democratic, civic participation in the economic development process and, if so, what is the best means to do so? What new partnerships can be built to avoid the fractured land use politics of the past several decades?

## A New Movement

As local governments grapple with their responsibility to shape development and land use patterns, a new movement has emerged to challenge conventional thinking and offer a broader vision. This movement is centered on the concept of *community benefits*—the simple proposition that the main purpose of economic development is to bring measurable, permanent improvements to the lives of affected residents, particularly those in low-income neighborhoods. This new movement is pressuring the public sector to play a more strategic role in land use planning and urban growth, in order to leverage its multibillion dollar investment in the private sector toward creation of good jobs, affordable housing, and neighborhood services that improve the quality of life for all residents. Just as the state fiscal analysis and Economic Analysis and Research Network (EARN) alliances are building capacity within grassroots organizations to understand state fiscal issues, the community benefits movement is building grassroots capacity and expertise to impact a wide range of land use and urban growth issues.

The community benefits movement began in California, where organizations in Los Angeles, San Diego, San Jose and the East Bay have worked individually and collectively to realize the tremendous social justice potential of economic development and land use planning. The movement is spreading rapidly, taking hold in metropolitan regions across the country, including Denver, Milwaukee, Minneapolis/St. Paul, Miami, Atlanta, Boston, Seattle, New York City, Chicago, and Washington D.C.

In most locations, community benefits work is arising from—and remains integrally connected to—the Smart Growth movement. Over the past decade, Smart Growth advocates have been successful at combating sprawling development, by bringing such issues as jobs-housing balance and transit-oriented development to the center of regional planning processes. In many jurisdictions, Smart Growth has progressed from being a set of proposals by advocates to becoming official government policy.

As the Smart Growth movement has matured, key practitioners have recognized the need to expand the scope of the policy debate on Smart Growth beyond narrowly defined “environmental” issues to engage such challenges as creating family-sustaining jobs in the urban core, bringing much-needed private capital into underinvested communities while avoiding displacement of low-income and middle-income families, and providing the range of public services that together constitute “livable communities,” with attention to child care, health care, and parks and open space.

The community benefits movement gives Smart Growth advocates a set of concrete policy tools to advance these outcomes in ways that can be measured: *e.g.*, how many thousands of affordable housing units have been built, how many tens of thousands of living wage jobs have been guaranteed, and how many millions of dollars have been redirected towards community services. The movement has also provided a vehicle to build broad coalitions that promote the deeper involvement of new constituencies, including communities of color, the organized labor movement, low-income urban residents and their institutions, and social service providers. For this reason, prominent champions of Smart Growth, such as the Sierra Club, the Greenbelt Alliance, Environmental Defense, Smart Growth America, Policy Link, and the Natural Resources Defense Council, have embraced the community benefits movement in different regions.

In virtually every area, community benefits coalitions are anchored by a renewed labor movement, with janitors and hotel workers, clerical workers, retail clerks and, in some cases, the building trades, stepping forward to participate in broader social justice alliances. Often, these labor coalitions include “Central Labor Councils,” regional alliances of unions dedicated to broadly improving the quality of life for working families. These organizations are joining together with groups that were often on the opposite side of land use disputes: environmentalists, housing developers, neighborhood advocates and others.

In the regions where the movement has taken root, the community benefits movement is reframing the public discourse on economic development. No longer limited to narrow discussions of tax revenue, the dialogue on development policy is now commonly characterized by spirited debates over living wage jobs, park space, affordable housing and proximity to transit corridors. For the first time in a generation, this movement has caused a broad range of public officials, planners, and community-based organizations to recognize the need to play a leadership role in land use planning, and to use public dollars and land use authority in strategic ways to improve job opportunities and the quality of life for low-income communities.

As a result, this movement is promoting democratic civic participation among populations and constituencies that usually engaged in land-use and economic development decisions. Once the near-exclusive province of developers and businesses, the decision-making process in these areas now often includes a much more diverse group of voices as communities become organized and gain the sophistication to effectively advocate for their demands.

Most importantly, the community benefits movement is measurably improving people’s lives. CBAs are now in place for major developments

in several cities, as described in this publication. These agreements guarantee thousands of new quality jobs, training opportunities, increased numbers of affordable housing units, green building practices, parks, child-care centers, and numerous other benefits.

The movement has achieved a level of momentum and visibility reminiscent of the early days of the “Living Wage” movement (out of which, in fact, many of the organizations advocating for community benefits arose). Groups in several cities are now pursuing citywide policies that would create minimum standards on jobs, housing and neighborhood services for public-private development projects. National press has picked up on this trend, with recent articles in the Wall Street Journal’s Real Estate Journal and the New York Times, among other prominent publications. (See Appendix C for the Wall Street Journal’s Real Estate Journal article, and [www.laane.org/pressroom/news.html](http://www.laane.org/pressroom/news.html) for many other examples.)

## This Publication

This publication is intended to help community groups learn how CBAs work, and to explain many of the different kinds of benefits for which community groups can negotiate. As you will see, there are now many different precedents, and we hope that groups will be inspired by these examples to continue to push the envelope.

A community group’s ability to win a CBA is directly related to how much power it has organized. For neighborhood organizations using this handbook, we assume that you have an organized power base built upon foundations such as block clubs, church-based committees, and/or labor unions. Nothing in this handbook takes the place of organizing, and having a great CBA proposal will get you nowhere unless people are organized enough to make decisionmakers take note.

As CPWF’s anchor organizations win more victories, demand for technical assistance and train-



have little leverage over developers and governmental agencies in a particular situation, seeking a CBA will not help—and could result in a poor precedent being set for future projects. CBA negotiations cannot be effective without a certain amount of leverage or working political capital. Of course, if the CBA negotiation process becomes routine in certain cities, then it should increase leverage for community groups generally. In addition, the coalition-building aspect of the CBA negotiation process should increase community leverage.

- **One's person's floor is another person's ceiling.** If developers are looking at the CBAs from past projects, they may not want to provide greater benefits than those provided by others. Community groups want to use past commitments as a “floor,” but developers will want to use them as a “ceiling.”

- **Legal expenses.** Setting forth community benefits in an enforceable legal document will usually require community groups to employ an attorney. We strongly recommend that neighborhood groups have their own attorney; relying on government attorneys and staff members to produce the language is not effective. Developers will generally have attorneys as well. While the community groups may conduct the negotiations, it is valuable, if not essential, to have the fine print of the CBA finalized by a trusted attorney, to make sure the contract reflects both the substance and spirit of the negotiations. While retaining an experienced attorney is the best option, community groups that lack the money to do so may seek pro bono help through legal assistance clinics, or by a referral from the National Lawyers Guild (go to [www.nlg.org](http://www.nlg.org) for a directory of chapters).

## LEGAL ISSUE: THE COALITION AS A LEGAL ENTITY

Because a coalition negotiating a CBA is negotiating as a single entity, it is natural to think that it is the coalition itself that will enter into the CBA with the developer. There are problems with that approach, however.

Most coalitions that enter into CBAs are not incorporated as stand-alone nonprofits. Rather, they are simply groups of organizations and individuals working together. Few coalitions have structured systems for determining who are official members, and who can speak or act on their behalf. (Such systems would be set out in bylaws or similar documents.) This uncertainty could cause problems if an unincorporated coalition were the legal entity that signed a CBA.

Such a CBA would naturally include commitments by the coalition to do certain things and to refrain from doing other things. It would be impossible to determine the scope of these commitments without firm rules for coalition membership and action. It is easy to imagine a situation where an individual who attended several coalition meetings spoke out against a development, after a CBA had been signed by the coalition with a commitment not to oppose the development. The developer might then claim that the individual was a coalition member and had violated the CBA—thus allowing the developer to avoid its obligations as well. The coalition might respond that the individual was not an official coalition member, or was not acting on behalf of the coalition—but

unless there were preestablished membership and action rules then the answer is not clear.

In addition, even if the coalition were the entity signing the CBA, every coalition member could probably be forced to comply with the coalition's commitments under the CBA. The coalition as a whole usually has the legal status of an "unincorporated association." While unincorporated associations can enter into contracts, they differ from corporations in that the members making up the entity can more easily be held responsible for the entity's commitments.

For these reasons, a better approach is to have each organizational member of the coalition sign the CBA on its own behalf. (Individual persons who are coalition members generally should not take on the legal benefits and burdens of a complex contract like a CBA.) This makes clear to each organization the legal reality that it must live up to the CBA's commitments; each organization will probably have its own internal approval process anyway.

This makes the CBA into a complex contract between as many as several dozen different parties. Nonetheless, for convenience the CBA can talk about the coalition organizations as a group, placing similar responsibilities on each of them. The definitions and technical language of the CBA just need to be clear about the approach.

### **Example: "Coalition" and "Organization" definitions and responsibilities in the LAX CBA.**

The following language is from relevant sections of the Cooperation Agreement that accompanied the LAX CBA. The LAX CBA is discussed in detail in Chapter One. The full CBA and Cooperation Agreement are available at: [www.laane.org/lax/index.html](http://www.laane.org/lax/index.html).

#### **Definitions:**

*"Coalition"* shall mean the LAX Coalition for Economic, Environmental, and Educational Justice, an unincorporated association comprised exclusively of the following Organizations that are signatories to this Agreement, and no other organizations or individuals: [all signing organizations are listed].

*"Organization"* shall mean each entity that is a member of the Coalition as defined above. Obligations of an Organization shall be obligations only of: (1) the Organization itself, as distinct from its member organizations or any natural persons; and (2) staff members or members of the board of directors of the Organization when authorized to act on behalf of the Organization.

#### **Coalition Responsibilities:**

... All obligations, powers, rights, and responsibilities of the Coalition under this Agreement shall be obligations, powers, rights and responsibilities of each Organization.

This language makes clear that *each* signing organization has the power to enforce the CBA, and the responsibility to comply with it. It also makes clear that *only* the signing organizations can be held to the CBA commitments. Finally, it clarifies that a signing organization cannot be held responsible for actions of its members, staffers, or board, except when those parties are authorized to act for the organization.

- 73 **Coalition politics.** Of course, building and maintaining coalitions is difficult, especially if the developer is seeking to peel off some groups. All of the basic structural issues about coalitions have to be resolved: Who is in the coalition? How are decisions made? Who is on the negotiating team? How are competing concerns prioritized?

Despite all of the difficulties and pitfalls, we feel that the benefits of a CBA far outweigh the risks. If groups organize well, stick together, and win a good CBA, they will probably set valuable precedents and make future campaigns in their city much easier.

### **An Understandable Concern: “This is new to us. We don’t do this type of thing.”**

CBAs raise complex issues for community-based organizations. Some community groups may be uncomfortable giving up the right to express negative opinions on a public matter like a development project. Many are not used to entering into complex legal agreements with powerful developers.

In light of these concerns, community groups may be tempted to simply advocate for inclusion of community benefits in a project’s development agreement, rather than negotiating a deal directly with the developer. This approach enables community groups to avoid the legal complexities and responsibilities of signing a CBA. If community groups genuinely trust the developer to provide the benefits as described, or if they trust the government to enforce the commitments as part of the development agreement, then this approach is simpler and makes sense.

However, there are serious risks to this approach, and important comparative benefits to a CBA. First, and most important, a CBA allows the community organizations that sign it to enforce

the developer’s commitments. They do not need to rely on the government to hold the developer to his promises. Government enforcement of community benefits is notoriously lax, and—no matter how committed the developer and city staffers seem—there is always a risk that promised community benefits will not materialize.

Second, a developer may be willing to provide better community benefits in exchange for a legally binding commitment of support from community groups, because he may feel more confident of the project’s success thanks to that community support. This is the basic negotiating principle that parties are willing to give more in order to get more.

Third, there is a symbolic benefit to having community groups and the developer sign a CBA. The signing validates and makes concrete the months of negotiations and hard work, and makes the development more likely to be successful and embraced by the community. When negotiations are leading toward an agreement that both sides will sign, there is an assurance that both sides take the negotiations seriously. Developers will have to treat their commitments as binding when they know community groups can enforce them; and community leaders will have to be willing to stand by their own commitments when they are signing a binding legal document. The goal of having a CBA is to provide a directed, serious framework, in which both sides can genuinely buy into the process.

In addition, while some community groups are understandably reluctant about making a legal commitment to refrain from opposing a development, they may have to make at least an implicit commitment in this regard even if they do not sign a CBA. That’s because the main reason the developer is negotiating over community benefits is to avoid community opposition. If community groups are not willing to refrain from opposing the project during the approval process, they

have little to offer a developer. For this reason, even if negotiated community benefits are only going to be incorporated into the development agreement (and not into a CBA), the developer will rightly expect that community groups with whom it reached agreement will not oppose the project.

Community-based organizations will quickly lose credibility if they negotiate an increase in a project's community benefits and then turn around and oppose the project. If community groups are seen by developers and by government officials as prone to reneging on their end of a deal—even only a “handshake” deal—it will impede the abil-

ity of other neighborhood groups to negotiate with developers in the future.

In sum, community groups are right to think carefully about their commitments before entering into a CBA—but the potential benefits are great. A community group should not sign a CBA unless (1) it believes that offering its public support in exchange for the negotiated community benefits is a good trade-off; and (2) it understands its commitments under the CBA and is willing and able to abide by them. If those conditions are met, having a CBA can greatly increase the quality and certainty of a project's community benefits.

## TIPS FROM THE ADVOCATES

Advocates who have been involved in CBA negotiations raise several points of importance. During negotiations:

- **Ensure adequate issue training and leadership development.** Because coalition members are interested and experienced in different issues, it may take time and focused effort to get everybody working together on a shared agenda. While in negotiations, it's important for community leaders to be versatile enough to back each other up, especially since the developer will be resistant to particular requests. Because there may be so many issues involved in the negotiations, coalition members need to educate each other on their various priorities. Issue trainings can help, and openness and communication are an obvious imperative.
- **Include advisors and observers.** While the negotiating team needs to be small, individuals with special expertise can sit in on negotiations as “observers,” and can advise and educate team members on technical issues like certain environmental concerns. Even without active

participation in the negotiations themselves, such advisors can play an important and active role in strategy sessions.

After a CBA is complete:

- **Involve coalition members in monitoring.** Coalition members can be the eyes and ears of the community once the project is moving forward. Observations of coalition members can be more revealing than any required reports from tenants or the developer.
- **Spread the word.** Nothing is more effective in encouraging new organizing efforts than hearing from organizers who have succeeded in the past. Coalition members who have been part of successful CBA negotiations can be instrumental in spreading the word to other communities. Sharing of experiences and lessons learned can help build a knowledge and power base across various communities—and can help inspire and build effective campaigns.

See Chapter Three for more information on CBA implementation.

# Conclusion

---

## Changing the Paradigm

As effective as community groups have been in negotiating recent CBAs, project-by-project negotiations are not an ideal approach.

Community groups should not have to identify upcoming projects, mobilize coalitions, and fight the same battles over and over again. In the long run, such an approach is too resource-intensive to be effective for anything but the largest and most prominent development projects. Many smaller subsidized projects will inevitably go forward without appropriate community involvement.

The goal of the community benefits movement is to avoid this situation by changing the paradigm of land use planning for large, publicly-subsidized projects or those requiring major land use approvals. Results of this change will take many concrete forms: citywide policies providing minimum standards for certain projects; changes in land use planning documents, like general plans,

to require analysis of economic effects of land use decisions; ordinances requiring close scrutiny of high-impact big-box stores; and an expectation that certain large, prominent, heavily subsidized projects will have a CBA.

Community benefits advocates should remain outcome-oriented. While this handbook describes an approach that has worked in many situations, the strength of this approach is its adaptability. Aspects of it that work in a given situation should be used, and aspects that don't should be jettisoned. Every community is different: in needs, in politics, in development opportunities, in strength and cohesiveness of community organizations. The CBAs described in this handbook came out of determined yet flexible advocacy; through flexibility and creativity, the determined advocates around the country will further develop this approach and craft new techniques as well.

## PARK EAST REDEVELOPMENT COMPACT

A broad coalition of labor and community advocates, the Good Jobs and Livable Neighborhoods Coalition, recently won a tremendous victory in Milwaukee. For two years, the Coalition has been pressing for strong community benefits standards for the downtown redevelopment of the Park East corridor. In 2004 the County Board passed a legally binding resolution establishing a range of community benefits requirements for the series of redevelopment projects that will reshape downtown Milwaukee in coming years. The resolution, known as the Park East Redevelopment Compact, sets out the following requirements for covered projects:

- employer participation in a County-assisted local hiring plan;
- prevailing wages for construction workers;
- additional apprenticeship and training requirements for construction employment;
- a 20% affordable housing requirement;

- selection of developers shall take into account the broad economic implications of the proposals, including jobs and tax base, and RFPs shall require developers to address those issues;
- County policies to assist disadvantaged business enterprises will apply to Park East redevelopment projects;
- consideration of green space and green design principles in evaluation of RFPs; and
- a standing Community Advisory Committee to advise the County on implementation of these requirements.

This range of principles and requirements, applicable to a series of large future redevelopment projects, is a perfect example of incorporation of community benefits principles into land use planning. The campaign for this project is also noteworthy in that it featured a close and effective collaboration between community groups and building trades. The broad coalition included the following groups:

## MEASURING BROADER IMPACTS

Several communities have recently moved to change their land-use planning processes to require a formal assessment of a wide range of impacts of proposed projects. Environmental impact reports are a crucial tool, but, with narrow exceptions, their scope is necessarily limited to environmental issues. The impacts of any large development are much broader than that, of course.

Large developments always have substantial social and economic impacts in many areas, including type and quality of jobs, availability and cost of goods and services, public finances and tax base, economic climate for surrounding businesses, jobs/housing balance, smart growth principles, and public safety. A large development could obviously have positive or negative impacts in most or all of these areas.

Because most planning processes do not include formal consideration of these wide-ranging impacts, community benefits advocates have proposed changes, and several government entities have responded:

- The Los Angeles Community Redevelopment Agency requires preparation of a “community context report” for certain projects, looking at a wide range of impacts.
- The city of Los Angeles recently passed an ordinance requiring developers who propose to bring in certain types of “big box” stores to pay for formal assessments of the economic impacts the stores. The assess-

ments must evaluate such factors as potential business, housing, and open space displacement; impact on city revenues; creation of blight; job creation or loss; and access to low-cost goods. Information on the ordinance is available at

[www.laane.org/ad/superstores.html](http://www.laane.org/ad/superstores.html). The text of the ordinance is available at [www.laane.org/ad/superstores.html](http://www.laane.org/ad/superstores.html).

- The city of Sacramento recently passed a “superstores” ordinance requiring an assessment similar to that required in Los Angeles.

Advocates have generally proposed these types of policies only for projects over a certain size or type, or that receive a public subsidy over a certain amount. Both members of the public and government decisionmakers will benefit from formal consideration of a wide range of project impacts.

In addition to project-specific impact assessment policies, some advocates have pushed for consideration of economic impacts of land use decisions at the “general plan” level—general plans are the basic land use planning documents in most cities. San Diego is currently considering addition of an “Economic Prosperity Element” to its general plan. Appendix H contains the city’s current draft of this language. Contact: Donald Cohen, Center on Policy Initiatives, 619-584-5744, [dcohen@onlinecpi.org](mailto:dcohen@onlinecpi.org).

Following are some of the benchmarks we'll be looking for over the next few years:

- an increasing number of local and state public officials who advocate for community benefits and are willing to speak to their peers in other cities;
- more CBAs won for specific developments;
- more RFPs and RFQs issued by public agencies requiring applicants to include a range of community benefits in their proposals;
- more development projects for which the public entity maintains a revenue stream dedicated for community benefits;
- new policies requiring certain minimum standards for subsidized projects, like local hiring or living wages;
- new policies requiring measurement of a wide range of impacts of proposed developments;

- an increasing number of redevelopment plans, specific plans, and other public land use planning documents that reflect community benefits principles; and
- an increase in media awareness of community benefits issues and coverage of community benefits campaigns.

We strongly encourage advocates throughout the country to be creative in designing and implementing a community benefits agenda in their own communities. Please contact us for assistance we can provide in developing your campaigns. The experience in California—and the burgeoning community benefits movement throughout the country—demonstrate that in the right circumstances, determined organizing and strategic advocacy can help publicly subsidized development projects deliver tremendous benefits to affected communities.





# Understanding Community Benefits Agreements: Equitable Development, Social Justice and Other Considerations for Developers, Municipalities and Community Organizations<sup>1</sup>

*Patricia E. Salkin and Amy Lavine\**

I.	INTRODUCTION .....	292
II.	WHAT ARE COMMUNITY BENEFITS AGREEMENTS? ..	293
III.	ACCOUNTING FOR THE GROWING INTEREST IN COMMUNITY BENEFIT AGREEMENTS .....	296
IV.	EXAMPLES OF CBAS .....	300
A.	<i>California</i> .....	300
1.	Hollywood and Highland Center (Los Angeles, 1998) .....	301
2.	Staples Center (Los Angeles, 2001) .....	302
3.	LAX Expansion (Los Angeles, 2004) .....	304
4.	Ballpark Village (San Diego, 2005) .....	306
5.	Other California CBAs .....	307
B.	<i>New York City</i> .....	308
1.	Atlantic Yards .....	309
2.	Columbia University Expansion .....	314
C.	<i>Other Notable CBAs</i> .....	317
V.	PRACTICAL PROBLEMS WITH CBAS .....	320
A.	<i>Community Organizing</i> .....	320

---

\* Patricia E. Salkin is Associate Dean and Director of the Government Law Center of Albany Law School. Amy Lavine is a staff attorney at the Government Law Center. She also maintains a blog about CBAs at <http://communitybenefits.blogspot.com>. The authors are grateful for the assistance of Albany Law School student Ami Orava in the preparation of this paper.

1. This article was written as a companion piece to Patricia Salkin and Amy Lavine, *Negotiating for Social Justice and the Promise of Community Benefits Agreements: Case Studies of Current and Developing Agreements*, J. OF AFFORDABLE HOUSING & COMMUNITY DEV. L. (forthcoming 2008).

B. <i>Bargaining Power and Bargaining Tactics</i> .....	321
C. <i>Money</i> .....	323
D. <i>Enforcement and Monitoring</i> .....	324
VI. LEGAL ISSUES RELATED TO CBAS .....	324
A. <i>Consideration</i> .....	324
B. <i>Standing to Enforce</i> .....	325
C. <i>Issues Related to the Planning Process</i> .....	327
VII. CHECKLIST OF ISSUES TO REVIEW IN CONSIDERING THE USE OF CBAS .....	328
VIII. CONCLUSION .....	331

## I.

## INTRODUCTION

The opportunity to develop a Community Benefits Agreement (CBA) typically arises when a developer announces plans to construct a major project, such as a stadium or a theater complex. Local residents and business owners may often welcome these projects, but they may also have legitimate fears, such as: Will the project displace local residents and local businesses, either physically or through gentrification? Will it cause traffic problems and generate noise, pollution, or other nuisances? Will the economic development benefits espoused by the developer actually create jobs that pay a living wage and offer decent benefits for residents in the neighborhood or in a larger geographic community? Will the developer seek and/or welcome public participation in the project design and review of environmental and community impacts? In short, will the developer and the resulting built project be good neighbors?

The CBA movement was born in the late 1990s as a mechanism for community groups to organize and work collaboratively to communicate and negotiate directly with developers. CBAs allow community groups to address a multitude of community impacts and opportunities that the host municipality may not have legal authority and/or the political will to discuss otherwise. Usually framed as private agreements (with or without municipal involvement), CBAs may require a developer to mitigate potential impacts of the development. But often they go even farther, asking the developer to work with the community to improve housing, employment options, and recreational and cultural facilities. As a result, CBAs can empower communities to become active participants in the planning process. Because of their po-

tential to improve communities' quality of life, CBAs are becoming increasingly popular.

While CBAs are ardently supported by many stakeholders as a tool for obtaining amenities that might otherwise be unavailable, it should not be assumed that they are always ideal vehicles to promote social justice issues. Practical problems—from organizing coalitions of community groups to negotiating with legally and politically sophisticated developers—sometimes combine to make the process of negotiating a successful CBA an unwieldy exercise. Moreover, CBAs have yet to stand the test of judicial review. When they do reach the courts, they will undoubtedly raise numerous issues of contract validity and interpretation. Additionally, where municipalities may be a party to the CBA and/or may give administrative or legislative validity to a privately negotiated agreement, delegation and enforcement issues are likely to arise.

This article offers an analysis of legal and policy issues surrounding the development, implementation and enforcement of CBAs. Part II offers a general explanation of CBAs—what they are, what types of benefits they commonly include, and how they are negotiated and finalized. Part III briefly discusses the reasons behind the popularity of CBAs, and explains how they have been tied to smart growth and other social justice issues. Part IV reviews select CBAs from various cities, offering examples of successful models as well as discussing more controversial efforts. These case studies not only assist in understanding the dynamics of the CBA negotiating process, but also they illustrate some of the practical difficulties associated with the CBA model. These problems are discussed in greater depth in Part V. Part VI presents the legal issues surrounding CBAs, including questions of enforceability and validity. Finally, Part VII offers a checklist of items to be considered by developers, communities and municipalities before and during negotiations.

## II.

### WHAT ARE COMMUNITY BENEFITS AGREEMENTS?

A CBA is a contract negotiated between a prospective developer and community representatives. In essence, a CBA specifies the public benefits and amenities that a particular developer will provide to the impacted community in exchange for the community's support of its proposed project. Community support goes far to ensure that the development approval process will

occur expeditiously, and it may be especially useful to developers seeking government subsidies, zoning variances or permits.<sup>2</sup>

Negotiations for a CBA usually take place between the project developer and a coalition of community groups, which may include labor, environmental, civic, and religious organizations. Many CBA provisions are inspired by social justice concerns and desires of the coalition, including such things as: living-wage requirements, "first source" (i.e. local) hiring and job training programs, minority hiring minimums, guarantees that developments will include low-income and affordable housing, environmental remediation requirements, and funding for community services and programs.<sup>3</sup> Because CBAs are negotiated on a case-by-case basis, the benefits can be tailored to meet specific community needs.<sup>4</sup>

The flexibility of the CBA model is also apparent in the processes by which these agreements may be negotiated. Negotiations may be initiated by a developer or by a community coalition, and in some cases they may be encouraged by local officials.<sup>5</sup> Often, broad-based community input, gained through

---

2. JULIAN GROSS, COMMUNITY BENEFITS AGREEMENTS: MAKING DEVELOPMENT PROJECTS ACCOUNTABLE 9-10 (Good Jobs First 2005), available at <http://www.goodjobsfirst.org/pdf/cba2005final.pdf>. For anyone interested in CBAs, Julian Gross' work is essential reading, providing a comprehensive analysis of CBAs in a highly readable style. In addition to making the development approval process easier, bargaining for community support may save the developer substantial sums of money in project financing costs as well as in potential legal fees resulting from proactive or defensive actions regarding the proposed development.

3. *Id.* at 10-11.

4. *Id.* This flexibility allows communities to address very specific needs, whether pre-existing or attributable to the proposed development. In Pittsburgh, for example, one of the primary benefits sought by the community in relation to the new Penguins hockey stadium is help in attracting a grocery store to the neighborhood. Residents have not had convenient access to a supermarket since the early 1980s. See Jeremy Boren, *Grocers may not desire Hill District site*, PITTSBURGH TRIBUNE-REV., Jan. 14, 2008, available at [http://www.pittsburghlive.com/x/pittsburghtrib/news/cityregion/s\\_547352.html](http://www.pittsburghlive.com/x/pittsburghtrib/news/cityregion/s_547352.html). Another example in which a CBA was specialized to unique local needs involved an expansion of Los Angeles' LAX airport. The parties agreed that LAX would fund sound-proofing in nearby schools and residences. See Gross, *supra* note 2, at 15-16.

5. Government involvement in CBAs has been widespread. In New York, the Columbia CBA was negotiated by a Local Development Corporation (LDC) created by the municipal authorities. Several seats on the LDC were filled by elected officials. See *infra*, pt. IV.B.2. City and county officials have also been heavily involved with negotiations concerning the construction of a new stadium for the Pittsburgh Penguins, as the stadium property is owned by the city-county Sports and Exhibition Authority and only leased to the Penguins. See Rich Lord, *Demolition begins at Penguins' arena site*, PITTSBURGH POST-GAZETTE, Apr. 11, 2007, available at <http://www.post-gazette.com/pg/07101/776848-61.stm>. In other states, CBAs may

public meetings, workshops and surveys, plays an important role in determining and prioritizing community goals. Community outreach may be initiated and facilitated by the emerging coalition, or the developer may attempt to coordinate a forum to ensure that an appropriate dialogue takes place.

After a CBA has been completed, it may, in some cases, be incorporated into a development agreement made between the developer and the municipality as part of the planning process.<sup>6</sup> Although this ensures a certain measure of transparency and also permits the government, as well as coalition members, to enforce the agreement, most states do not authorize local governments to enter into development agreements, so many CBAs will be enforceable only by the contracting community groups.<sup>7</sup> This reality raises a number of yet tested legal issues, including who will have standing to challenge and enforce privately negotiated CBAs, and whether these voluntary agreements, regardless of their terms, will be enforceable in a court of law.<sup>8</sup>

CBAs are considered by their supporters to be powerful tools for assuring that community impacts will not be overlooked

---

be incorporated into agreements reached between developers and local governments, and in these cases public officials also may become involved with the CBA negotiating process. See GROSS, *supra* note 2, at 9-10. It should be noted, however, that the involvement of public officials in this stage of negotiations does raise potential legal issues that should be carefully considered. See Salkin & Lavine, *supra* note 1, at n. 4.

6. A development agreement is a contract negotiated between a local government planning agency and a developer. In these agreements, the developer agrees to provide certain benefits to the public or to restrict the use of the land. In exchange, the local government promises to freeze the current zoning and land use laws for a certain period of time, thereby assuring that the development's construction will not be interrupted or stopped. See generally David L. Callies & Julie A. Tappendorf, *Unconstitutional Land Development Conditions and the Development Agreement Solution: Bargaining for Public Facilities After Nollan and Dolan*, 51 CASE W. RES. L. R. 663 (2001). Development agreements have been authorized in about a dozen states, including: Arizona, ARIZ. REV. STAT. ANN. § 9-500.50 (2007); California, CAL. GOV'T CODE § 65864 (Deering 2008); Colorado, COLO. REV. STAT. §§ 24-68-101 – 106 (2007); Florida, FLA. STAT. ANN. § 163.3220 (2007); Hawaii, HAW. REV. STAT. § 46-123; Idaho, IDAHO CODE § 67-6511A; Louisiana, LA. REV. STAT. ANN. § 33:4780.22 (2008); Nevada, NEV. REV. STAT. § 278.0201 (2007); New Jersey, N.J. STAT. ANN. § 40:55D-45.2 (2007); Oregon, OR. REV. STAT. (ORS) § 94.504 (2005); South Carolina, S.C. CODE ANN. § 6-31-10; Virginia, VA. CODE ANN. § 15.2-2303.1 (2007); and Washington, WASH. REV. CODE ANN. § 36.70B.170 (2008). *Id.* at 671, note 32.

7. GROSS, *supra* note 2, at 10 (stating that the authors “strongly recommend that a CBA be incorporated into any development agreement for a project, so that the CBA becomes enforceable by the government entity that is subsidizing the development”).

8. See discussion *infra*, Part VI.

when large developments are planned for the neighborhood. Developers may also support the negotiating process as an effective method for obtaining community support, making the project approval process faster and smoother. Local governments may also look favorably upon CBAs since they can expect that when successful negotiations have occurred between the community and the applicant, it is less likely that the municipality will have to expend its resources defending land use and environmental permitting decisions. In addition, privately negotiated CBAs tend to remove and/or lessen the political pressures that might otherwise come to bear on elected and appointed representatives involved in the decision-making process.

### III.

#### ACCOUNTING FOR THE GROWING INTEREST IN COMMUNITY BENEFIT AGREEMENTS

CBAs have been negotiated in relation to dozens of development projects in cities across the country.<sup>9</sup> The growing interest in this practice is due in part to factors such as increased urban redevelopment and reinvestment in the face of shrinking federal aid provided to cities; the evolution of the smart growth movement; an awareness of the connectivity between land use and environmental justice; and increased public concern regarding developer accountability.

The types of development projects that most often give rise to CBAs—large-scale urban projects—are becoming more common. According to a recent study, eight out of the ten largest cities in the U.S. experienced population increases during the 1990s for the first time in decades and the growth rate is expected to accelerate over the next twenty years.<sup>10</sup> Space limitations and geographic boundaries have created expansion barriers and have resulted in the need and/or opportunity for redevelopment of already-populated areas. This creates a ripe environment for

---

9. Harold Meyerson, *No Justice, No Growth; How Los Angeles is Making Big-Time Developers Create Decent Jobs*, THE AMERICAN PROSPECT (Nov. 2006).

10. GREG LEROY & ANNA PURINTON, Community Benefit Agreements: Making Sure Urban Redevelopment Benefits Everyone 19 (Neighborhood Funders Group 2005), available at [http://www.nfg.org/publications/community\\_benefits\\_agreements.pdf](http://www.nfg.org/publications/community_benefits_agreements.pdf). Urban scholars have coined the phrase "the back to city movement," and attribute it to an increased number of baby boomers looking to downsize and live closer to work, the post 1960s generation perception that an urban lifestyle is preferable, and an influx of Asian and Latin American immigrants relocating in urban neighborhoods. See Gross, *supra* note 2, at 4.

CBAs, which function best when the community base is large and where the developer needs community support in order to obtain subsidies, approvals, or regulatory variances (as is often the case in dense urban neighborhoods). As urban areas become more popular locations for large developments, residents are becoming increasingly empowered to demand that such developments “give back” to the community with benefits that improve urban quality of life.<sup>11</sup> And, as has been suggested, “no one can credibly argue that a major development should *not* benefit the community. . . .”<sup>12</sup>

The “accountable development” movement has also contributed to the spread of CBAs. According to this view, communities provide substantial tax incentives and subsidies to developers to support new job creation, while developers pin community hopes upon attenuated “ripple effects” without giving communities any control over the job opportunities created.<sup>13</sup> Billions of dollars in taxpayer funds are funneled into economic development projects, but many projects produce “mixed results” and offer few assurances that developers’ promises of new jobs for community residents will be actually realized.<sup>14</sup> Additionally, impacts like gentrification, the creation of low-wage, dead-end jobs lacking health benefits, and the loss of affordable housing that frequently accompany large-scale urban developments have led to an awareness that economic development, without more, often fails to benefit the people who need it most.<sup>15</sup> By formalizing developers’ commitments to create jobs that benefit residents and to improve local housing and social conditions, CBAs add a dose of accountability to the often considerable tax benefits and subsidies that make large-scale developments possible. A representative from the Pratt Institute Center for Community and En-

---

11. *Id.* at 19.

12. *Id.* at 18.

13. *See* Gross, *supra* note 2, at 4.

14. *See id.*

15. *Id.* In April 2005, the New York City Council’s Select Committee on Community Development held a series of hearings due to concerns “that despite recent economic development activity and community development efforts, thousands of City residents living in distressed New York City neighborhoods, still continue to experience high levels of concentrated poverty, joblessness, poor health outcomes and low educational achievement.” Marcel Van Ooyen, Legislative Director, Briefing Paper of the Infrastructure Division, *NYC Oversight: Linking New York City Economic Development Policies and Programs to Community Development Strategies* (May 16, 2005).



vironmental Development explained his support of the use of CBAs:

[New York] City's community development efforts have often been separate from the larger economic development strategy which largely consisted of tax breaks, subsidies and large scale projects . . . . Today's community development needs to embrace new strategies to insure that the City's economic development investments create truly shared prosperity, not with lip service to job creation, but with sustained and significant efforts.<sup>16</sup>

The Smart Growth movement, with its emphasis on development guided by "equity, economy, and the environment," is also credited with the evolution of CBAs.<sup>17</sup> Smart Growth advocates have developed principles that focus beyond suburban sprawl and the environment, to include policy concerns related to the creation of livable cities with living-wage jobs.<sup>18</sup> After all, promoting the growth of healthy urban areas where residences, jobs, services, and entertainment are near enough to obviate the need for cars may be the most effective way of stopping sprawling, auto-dependent development. This also serves the current public policy goal of reducing greenhouse gas emissions to slow climate change.

In addition to advancing these Smart Growth goals by improving communities' quality of life, CBAs can be effective tools for promoting racial and social equity. Large-scale urban developments tend to have disproportionate impacts on low-income and minority communities, and CBAs provide a mechanism for these communities to ensure that they will benefit from developments rather than being overlooked or displaced through gentrification.

---

16. *Id.*

17. See GROSS, *supra* note 2, at 4. The Smart Growth movement focuses on using comprehensive planning policies and tools to work toward sustainable development. Some smart growth goals include fostering community identity, preserving natural and cultural resources, ensuring social justice, expanding choices among transportation and housing options and encouraging healthy lifestyles. To achieve these goals, smart growth supports compact, mixed use and pedestrian/bicycle oriented planning with projects reusing existing infrastructure and locating in urban areas where transit and other services are available. See American Planning Association, Policy Guide on Smart Growth, <http://www.planning.org/policyguides/smartgrowth.htm>. For more information about smart growth initiatives, see Patricia E. Salkin, *Squaring the Circle on Sprawl: What More Can We Do? Progress Toward Sustainable Land Use in the States*, 16 WIDENER L.J. 787 (2007).

18. GROSS, *supra* note 2, at 5.

CBAs may also provide built-in benchmarks that allow the effectiveness of these Smart Growth policies to be measured.<sup>19</sup>

The resurgence in urban center growth coincides with a steady decline of federal aid to cities. Fears of further reductions in federal funding for Community Development Block Grants, as well as concerns about future federal support levels for public housing and Section 8 rent-subsidy vouchers, have generated interest in developing effective public-private partnerships to meet low-income housing needs and advance other Smart Growth policies. CBAs, with their ability to be more inclusive of diverse local interests than conventional public-private arrangements, are well suited in this regard.<sup>20</sup> Community involvement is especially necessary, because although city and county governments have planning departments, they are often relegated to "processing permits and other land use applications" and acting as facilitators in the private development process rather than being empowered to take on more of a leadership role in addressing other pressing Smart Growth needs.<sup>21</sup>

Perhaps most significantly, the rising popularity of CBAs can be attributed to their ability to empower low-income and minority communities and give them a voice in the development process. This process is frequently dominated by corporate interests and has failed in the past to include the people most likely to be affected by its results, often to the detriment of residents and local businesses.<sup>22</sup> For many of these communities, CBAs are also seen as a way to make up for past planning practices such as redlining and slum clearance that harmed poor and minority citizens. The CBA negotiating model has thus enabled local groups across the country to become more involved in their neighborhoods and to hold developers more accountable by persuading them that when they take advantage of a certain project site for commercial profit, they must reinvest a measure of those profits in the neighborhood and the people who live there. These ideal-

---

19. See *id.* (noting that "[t]he community benefits movement gives Smart Growth advocates a set of concrete policy tools to advance these outcomes in ways that can be measured: e.g., how many thousands of affordable housing units have been built, how many tens of thousands of living wage jobs have been guaranteed, and how many millions of dollars have been redirected towards community services").

20. See David A. Marcello, *Community Benefit Agreements: New Vehicle for Investment in America's Neighborhoods*, 39 URB. L. 657, 660-62 (2007).

21. See Gross, *supra* note 2, at 4.

22. See Marcello, *supra* note 20, at 661-62 (describing how the public has long been excluded from the planning process of public-private partnerships and why government officials may not adequately represent communities' interests).

istic principles, coupled with proven CBA successes, have captured the imagination of community groups all over the country.<sup>23</sup>

#### IV.

##### EXAMPLES OF CBAS

The following review of select existing CBAs exposes the benefits and challenges in negotiating, implementing and enforcing these agreements. It also reveals the similarities and differences inherent in community-based approaches that are as diverse as the neighborhoods where they arise.<sup>24</sup>

##### A. California

There are more current and developing CBAs in the State of California than in any other state. Possible reasons for this phenomenon may include the fact that development agreements are authorized by state statute,<sup>25</sup> and the existence of a high intensity of progressive activism and advocacy by community organizers in the state. What follows are highlights of some of the CBAs in California.

23. CBAs have been championed by a number of national groups that link and organize community groups around the country. These organizations, such as the Partnership for Working Families, Good Jobs First and the Association of Community Organizations for Reform Now (ACORN), among others, have been instrumental in the drive to make CBAs common across the country. CBAs involve complex organizing, negotiation and drafting skills, and the resources that these organizations have offered to local groups have been important in making the CBA model viable. Gilda Haas, the executive director of Strategic Actions for a Just Economy (SAJE), a leading pro-CBA organization, explains, "community benefits agreements are tactical maneuvers in a strategic offense to take back our city. We want to take it back from historic redlining and absentee owners that have stripped our neighborhoods of their equity. To take it back from slumlords and speculators. To take it back from people who do not even see the beauty of our members, relationships, and children—who do not, in fact, see our communities at all." See Gilda Haas, *Community Benefits or Community Control? What We Really Want*, STRATEGIC ACTIONS FOR A JUST ECON., Feb. 21, 2007, available at [http://www.saje.net/site/c.hkLQJcMUKrH/b.2615505/k.13C4/Community\\_Benefits\\_or\\_Community\\_Control.htm](http://www.saje.net/site/c.hkLQJcMUKrH/b.2615505/k.13C4/Community_Benefits_or_Community_Control.htm).

24. See Patricia E. Salkin & Amy Lavine, *supra* note 1, for information on additional CBAs. The case studies discussed herein are also discussed in the aforementioned article. For news relating to the monitoring and implementation efforts related to existing CBAs and the progress of ongoing CBA campaigns, see the Community Benefits Agreements Blog at <http://communitybenefits.blogspot.com>.

25. CAL. GOV'T CODE § 65864 (West 1997).

## 1. Hollywood and Highland Center (Los Angeles, 1998)

The first CBA was negotiated in 1998 in relation to the development of the Hollywood and Highland Center, home to the theater that now hosts the annual Oscar ceremonies.<sup>26</sup> The development, which includes more than 4,000 theater seats, several parking lots and hotels, and 1.2 million square feet of retail space, was projected to cost \$388 million.<sup>27</sup> The project sparked concerns among Hollywood residents and business owners that traffic and congestion would be increased, that there might be environmental and aesthetic effects, and that crime rates might go up.<sup>28</sup> With the help of Los Angeles Councilwoman Jackie Goldberg and the Los Angeles Alliance for a New Economy (LAANE), the developer agreed to a deal with community groups. In exchange for the groups' support, the developer offered to finance traffic improvements, ensure that workers at the center would be paid a living wage, implement a first-source hiring plan, and enact a policy of union-neutrality.<sup>29</sup> The deal, though, was not one-sided; community support of the development helped the developer to obtain \$90 million in subsidies from the city.<sup>30</sup>

By most accounts the project has been a success. In addition to revitalizing Hollywood Boulevard, nearly 70% of the initial employees hired at the complex were recruited from the immediate area and about half of the permanent positions provide living wages.<sup>31</sup> In 2004, LAANE reached another CBA for a development just down the street from Hollywood and Highland. The benefits package for the Hollywood and Vine mixed-use, transit-oriented development included similar living wage, affordable

---

26. Hass, *supra* note 23. The Hollywood and Highland agreement was not the first fully-fledged CBA. Rather than existing as a stand alone contract, the CBA was incorporated in the development agreement. For this reason, some people credit the Staples Center agreement as the first CBA.

27. Greg Goldin, *Mall-ywood*, L.A. WEEKLY, Dec. 18, 1998, at 30, available at <http://www.laweekly.com/news/news/mallywood/6982/?page=1>.

28. *Id.*; See also Jonathan Darr, Letter to the Editor, *Proposed Complex in Hollywood*, LOS ANGELES TIMES, Apr. 12, 1998, at M-4.

29. Goldin, *supra* note 27; LAURA WOLF-POWERS, BUILDING IN GOOD JOBS: LINKING ECONOMIC AND WORKFORCE DEVELOPMENT WITH REAL ESTATE-LED ECONOMIC DEVELOPMENT 18 (2006), available at [http://www.nycetc.org/pdf/Building\\_in\\_Good\\_Jobs\\_Report\\_12\\_06.pdf](http://www.nycetc.org/pdf/Building_in_Good_Jobs_Report_12_06.pdf).

30. WOLF-POWERS, *supra* note 29, at 18.

31. *Id.* See also SARAH GRADY WITH GREG LEROY, MAKING THE CONNECTION: TRANSIT-ORIENTED DEVELOPMENT AND JOBS 17-18 (Good Jobs First 2006), available at <http://www.goodjobsfirst.org/pdf/makingtheconnection.pdf>.

housing, and job training provisions.<sup>32</sup> As of early 2008, Hollywood and Vine's affordable housing was under construction and the developer had taken steps to implement other aspects of the CBA.<sup>33</sup>

## 2. Staples Center (Los Angeles, 2001)

The success of the Hollywood and Highland CBA was followed in 2001 by the completion of what is sometimes referred to as the first "full-fledged" CBA. This CBA was negotiated during the development of the Staples Center, a sports arena that is home to the Los Angeles Lakers.<sup>34</sup> Community residents suffered a blow when the developer failed to provide orally promised benefits after the completion of the project's first phase.<sup>35</sup> The community hoped that a CBA would ensure that the developer would follow through with promises made in relation to the project's second phase—the construction of L.A. Live, a sports and entertainment complex on a 27 acre parcel including two hotels, a theater, apartment buildings and a retail complex. Negotiations were held between the developer and the Figueroa Corridor Coalition for Economic Justice, which represented more than thirty community organizations, including environmental groups, church groups, health organizations, and immigrants' and tenants' rights supporters. Strategic Action for a Just Economy (SAJE) and LAANE were also involved in the negotiating process, providing organizational and political support to the coalition and community members.<sup>36</sup>

The spectre of broad community opposition to the project, which required significant land use variances and city subsidies, provided the community with the necessary leverage to negotiate

---

32. *Community Praises Hollywood & Vine Developers for Community Benefits Package; Agreement Will Bring Living Wage Jobs, Affordable Housing and Job Training to Hollywood*, BUS. WIRE, available at [http://findarticles.com/p/articles/mi\\_m0EIN/is\\_2004\\_June\\_17/ai\\_n6083769](http://findarticles.com/p/articles/mi_m0EIN/is_2004_June_17/ai_n6083769)

33. Telephone interview with Roxana Tynan, Deputy Director, LAANE (Mar. 6, 2008).

34. GOOD JOBS FIRST, COMMUNITY BENEFITS AGREEMENTS VICTORIES, [http://www.goodjobsfirst.org/accountable\\_development/community\\_benefit\\_vic.cfm](http://www.goodjobsfirst.org/accountable_development/community_benefit_vic.cfm) (last visited Mar. 14, 2007) [hereinafter COMMUNITY BENEFITS AGREEMENTS VICTORIES].

35. Union groups had obtained promises of union-neutrality and living-wage benefits, but the developers refused to implement them after receiving the variances and subsidies from the city. The community had been further affected by the displacement of more than 250 residents, mostly low-income, and by the increase in traffic, noise and parking problems. *Id.*

36. *Id.*

one of the most comprehensive CBAs made to date. The completed agreement states that its purposes are to:

[P]rovide publicly accessible park space, open space, and recreational facilities; target employment opportunities to residents in the vicinity of the Figueroa Corridor; provide permanent affordable housing; provide basic services needed by the Figueroa Corridor community; and address issues of traffic, parking, and public safety.<sup>37</sup>

The CBA included reporting requirements and established a committee to monitor and enforce the agreement and to maintain a dialogue between the developer and the coalition.<sup>38</sup> The CBA was also incorporated into the development agreement between the developer and the city's redevelopment agency, making it enforceable by the city as well as by the contracting community groups.<sup>39</sup>

Several aspects of the Staples Center CBA were implemented shortly after its completion, including the establishment of a residential parking permit program and the distribution of seed money for the construction of affordable housing.<sup>40</sup> Since then, the developer has carried through with its obligations in a timely

---

37. *Id.*; Staples Center Community Benefits Agreement, at section I, available at <http://www.saje.net/> (follow "publications" hyperlink; then follow "LA Sports and Entertainment District Agreement" hyperlink). More specifically, the developer agreed to the following provisions:

To provide at least \$1,000,000 for the creation or improvement of parks and recreational facilities;

To provide \$25,000 per year for a term of five years for the creation of a permit parking program;

To comply with the city's living wage ordinance and to make all reasonable efforts to reach the goal of ensuring that 70% of the jobs created by the project pay a living wage;

To give priority hiring to persons displaced by the project and to low income individuals residing within three miles of the project;

To coordinate job training programs with community groups;

To provide \$100,000 in seed money for the creation of the First Source Referral System;

To set aside 20% of the residential units constructed within the project as affordable-housing and to provide \$650,000 in interest-free loans to non-profit housing developers for the creation of additional affordable housing;

And to cooperate with the Coalition to establish an Advisory Committee to assist with the implementation and enforcement of the agreement. *Id.*

Additionally, the developer signed separate card check/neutrality agreements with five union organizations. See COMMUNITY BENEFITS AGREEMENTS VICTORIES, *supra* note 34.

38. Staples Center Community Benefits Agreement, *supra* note 37, at section 11.

39. COMMUNITY BENEFITS AGREEMENTS VICTORIES, *supra* note 34.

40. *Id.*

manner and with few problems.<sup>41</sup> One million dollars has been spent on parks, with priorities for the funding being determined through a series of community meetings and workshops.<sup>42</sup> About 300 units of inclusionary affordable housing have been financed, and a revolving loan fund for local businesses has revolved several times.<sup>43</sup> The coalition and city have also been able to assess the developer's compliance with the CBA's living wage requirements through annual reports detailing the proportion of living wage jobs created by the project.<sup>44</sup> SAJE has continued to be intimately involved with the project, and meetings between the coalition and the developer have been held quarterly to monitor the implementation of the CBA. Additionally, SAJE has developed a jobs program for local residents and businesses.

The Staples Center CBA has also shown that the flexibility of CBAs may extend beyond their initial negotiation. The CBA included provisions for assessment of the agreement's implementation at five and ten years after its completion; if it is found that the developer's performance of its obligations falls below 80% of the CBA's goals for two consecutive years, then the developer must meet with the coalition to formulate a mutually accepted plan to reach those goals.<sup>45</sup> The parties have also modified the CBA at their own instance to respond to the changing needs of both the developer and the community.<sup>46</sup>

### 3. LAX Expansion (Los Angeles, 2004)

Another Los Angeles CBA demonstrates the flexibility and adaptability of this method of negotiating. In December 2004, the Los Angeles City Council approved the agreement reached between Los Angeles World Airports (LAWA), the public administrator of LAX airport, and a coalition of 22 community

---

41. See Laurie Kaye & Jerilyn Lopez Mendoza, *Environmental Defense, Everybody Wins: Lessons from Negotiating Community Benefits Agreements in Los Angeles* 2.11 (2008), available at <http://www.environmentaldefense.org/everybodywins>.

42. *Id.*

43. Telephone interview with Gilda Haas, Executive Director, SAJE (Feb. 1, 2008). See also Kaye & Mendoza, *supra* note 41.

44. Kaye & Mendoza, *supra* note 41.

45. *Id.*

46. Telephone interview with Gilda Haas, *supra* note 43. The CBA was renegotiated at one point because the developer was having difficulty complying with a provision prohibiting construction of market-rate housing units until affordable units were built. SAJE was willing to renegotiate the provision because it was interested in setting up a community land trust in order to combat gentrification.

groups concerning an \$11 billion airport expansion.<sup>47</sup> Among the coalition members were two local school districts and organizations representing community, religious, environmental, and labor interests.<sup>48</sup> In addition to provisions covering job training, first-source hiring, and living-wage requirements,<sup>49</sup> the CBA also devoted substantial resources toward mitigating the environmental impacts of the airport. As a result, the airport provided more than \$8.5 million annually for the soundproofing of local schools, city buildings, places of worship, and homes,<sup>50</sup> and it agreed to fund studies on air quality and community health.<sup>51</sup> Further, the CBA requires LAX to implement a number of environmental controls, including the electrification of passenger gates and cargo areas (to reduce the need for engine idling), emissions reductions and the conversion of airport vehicles to alternative fuels.<sup>52</sup> The CBA also clearly requires LAWA to incorporate CBA provisions into all airport contracts, lease agreements, and licensing or permitting agreements, thus ensuring the translation of the requirements to the airport's contractors and tenants.<sup>53</sup>

---

47. Sheila Muto, *Residents Have Their Say on LAX Expansion Plans*, THE WALL ST. J., Dec. 15, 2004. Although the Federal Aviation Administration initially expressed concern that the CBA might conflict with a federal law requiring the use of airport revenue to be aviation-related, it has since abandoned its opposition to the program. Dan Laidman, *FAA Changes Course on Airport-Related Jobs*, Copley News Service, Dec. 13, 2006.

48. For a complete list of the CBA signatories, see *The LAX Coalition and the CBA*, 1 STAKEHOLDER CONNECTION 2 (LAX/Los Angeles World Airports, L.A., Cal.), available at [http://www.laxmasterplan.org/stakeholder/pdf/Newsletter\\_Vol1\\_Issues2\\_only.pdf](http://www.laxmasterplan.org/stakeholder/pdf/Newsletter_Vol1_Issues2_only.pdf).

49. COMMUNITY BENEFITS AGREEMENT: LAX MASTER PLAN PROGRAM § 5-6, 4, available at [http://www.laane.org/docs/policy/cbas/LAX\\_CBA.pdf](http://www.laane.org/docs/policy/cbas/LAX_CBA.pdf). The CBA also establishes a program to encourage the involvement of women and minority owned businesses. *Id.* at § 13.

50. *Id.* at § 3. The "Aircraft Noise Mitigation Program" also requires LAX to limit nighttime departures. The noise mitigation concessions were seen as an especially important aspect of the CBA to local schools, many of which had boarded up their windows in attempts to avoid the noise. *Id.* As one community activist explained, "[g]enerations [of students] have come and gone through school here with rattling windows, teachers they couldn't hear, and no natural light in their classroom experience. . . ." Daniel B. Wood, *In Los Angeles A Unique Plan to Dull the Roar of Jets*, THE CHRISTIAN SCIENCE MONITOR, Dec. 21, 2004, at 2.

51. COMMUNITY BENEFITS AGREEMENT: LAX MASTER PLAN PROGRAM, *supra* note 49, at § 7-8.

52. *Id.* at § 10.

53. *Id.* at § 5(A). For example, LAWA has required area hotels to reduce the number of airport shuttle trips made daily in order to comply with the CBA's air quality provisions. Thomas Winfrey, *LAX Requires Hotels to Consolidate Courtesy Shuttle Trips to Improve Air Quality, Reduce Traffic Congestion*, MARKET WIRE, Dec. 4, 2006.



Implementation of the LAX CBA has been affected by political trends and a lawsuit brought to prevent the airport from expanding.<sup>54</sup> While the lawsuit did not succeed in preventing the expansion, the settlement agreement contained several modifications to the expansion plan, resulting in delays to the CBA's implementation.<sup>55</sup> Internal changes in the coalition and complications with Federal Aviation Administration requirements have also slowed implementation.<sup>56</sup> Despite these hold-ups, the CBA is proceeding. In early 2008, LAWA announced plans to spend more than \$2 million on an air pollution study as part of its obligations under the CBA. It will be the most comprehensive airport pollution study to have been undertaken in the United States, and it will provide data to show which communities are bearing the brunt of the airport's environmental impacts.<sup>57</sup>

#### 4. Ballpark Village (San Diego, 2005)

In September 2005, a broad coalition of 27 housing, labor, community, environmental, and religious groups negotiated San Diego's first CBA with developer JMI/Lennar in relation to Ballpark Village, a seven-acre project with 3.2 million square feet of offices, residences and retail space. The CBA negotiations were held in private and were not made public until just before the city council was to vote on the project's master plan.<sup>58</sup> By this time, the developer had been working on a deal with the local redevelopment agency for nearly two years, and the last minute change in plans provoked some criticism that it had "circumvented the process."<sup>59</sup> Moreover, the new agreement called for significant changes to be made to the project's affordable housing component. Although it called for more units, none of them were to be inclusionary units located on-site, as the agreement with the redevelopment agency required. Despite this negative publicity surrounding the CBA, a revised version that

---

54. Kaye and Mendoza, *supra* note 41, at 3.26.

55. *Id.*

56. *Id.*

57. See Tami Abdollah, *Plan Aims to Gauge LAX's Effect on Area's Air Quality*, LOS ANGELES TIMES, Feb. 26, 2008; LAWA, News Release, Airport Commission Awards Contracts to Study Air Pollutant Emissions at LAX, Feb. 25, 2008, available at <http://www.lawa.org/news/newsDisplay.cfm?newsID=999>.

58. Martin Stolz, *S.D. Council OKs Huge Ballpark Village Project; Compromise Ends Weeks of Rancor*, SAN DIEGO UNION-TRIBUNE, Oct. 20, 2005, at B-12:6, B-4:1.

59. Martin Stolz, *New Ballpark Village Deal Rejected; CCDC Rips Developers of Downtown Project*, SAN DIEGO UNION-TRIBUNE, Oct. 5, 2005, at B-1:1,7, B-4:6.

incorporated some aspects of the original affordable housing plan was eventually approved,<sup>60</sup> and the CBA, as a whole, has been viewed positively.<sup>61</sup> The agreement set out a range of community benefits, including:

- requirements that the developer meet LEED green building standards for the development and use environmentally-friendly construction practices;
- a requirement to include “bird-friendly” structural elements, such as non-reflective windows;
- mitigation, monitoring and reporting programs to reduce pollution during construction;
- a living wage requirement for the developer’s employees and the employees of its service contractors;
- a local hiring program;
- \$1.5 million in funds set aside for job training programs for community residents;
- plans for on and off-site affordable housing, with the total number of units exceeding the city’s minimum affordable housing requirement;
- a commitment to attract a grocery store to the community that would offer living wages and provide benefits; and
- funding for a gentrification study and for community arts, youth, and cultural programs.<sup>62</sup>

### 5. Other California CBAs

In addition to these four CBAs, an agreement was entered into in 2001 related to the redevelopment of an environmentally contaminated industrial site in Los Angeles, but the plans for the project were tabled after the developer went bankrupt.<sup>63</sup> The Marlton Square CBA involves another less than ideal situation. The community benefits that were to be provided by the developer pursuant to the agreement have yet to be realized due to difficulties in attracting tenants to the project development.<sup>64</sup>

---

60. Stolz, *supra* note 58.

61. See, e.g., *Ballpark Village Project Sets New Standards for Affordable Housing and Jobs in San Diego*, CENTER ON POLICY INITIATIVES, available at <http://www.onlinecpi.org/article.php?list=type&type=131>.

62. The Partnership for Working Families: Ballpark Village CBA – San Diego 2005, <http://www.communitybenefits.org/article.php?id=575>.

63. See Salkin & Lavine, *supra* note 1. The SunQuest site was bought by another developer and it is now unclear whether the CBA will apply. Interview with Roxana Tynan, *supra* note 33.

64. See Salkin & Lavine, *supra* note 1; Marlton Square, Los Angeles, <http://communitybenefits.blogspot.com/2008/01/marlton-square-cba.html> (Jan. 28, 2008, 22:13 EST).

In contrast, the NoHo Commons project in Los Angeles was successful in providing affordable housing, job training, living wages and first source hiring for community residents while enabling the developer to receive significant city subsidies for the development.<sup>65</sup> The NoHo Commons developer has been cooperative, and implementation of the CBA has progressed smoothly.<sup>66</sup>

The CBA emanating from a downtown development of a residential retail and entertainment complex in San Jose is also proving to be successful as the developer continues to fulfill commitments under the CBA, including living wage provisions, project labor agreements and affordable housing requirements.<sup>67</sup> In an Oakland CBA, ongoing litigation surrounding a waterfront redevelopment project has delayed the implementation of a 2006 CBA designed to provide affordable housing.<sup>68</sup>

#### B. *New York City*

Communities in New York did not begin to utilize CBAs until 2005, about eight years after they were initially used in California. The California experience has influenced both the process and substance of CBAs in New York, but it appears as though the actual negotiation of CBAs in New York has been somewhat more controversial. Two of the CBAs emanated from proposed stadium development projects,<sup>69</sup> one from a proposed university expansion,<sup>70</sup> and one from a mall development.<sup>71</sup> Other CBA

---

65. See Salkin & Lavine, *supra* note 1. See also NoHo Commons CBA, <http://communitybenefits.blogspot.com/2008/01/2001-deal-in-relation-to-large-mixed.html> (Jan. 28, 2008, 22:10 EST).

66. Interview with Roxana Tynan, *supra* note 33.

67. See Salkin & Lavine, *supra* note 1; See San Jose CIM Project CBA, <http://communitybenefits.blogspot.com/2008/01/san-jose-cim-project-cba.html> (Jan. 28, 2008, 22:18 EST).

68. See Salkin & Lavine, *supra* note 1; See Oak to Ninth CBA, <http://communitybenefits.blogspot.com/2008/01/oak-to-ninth-cba.html> (Jan. 28, 2008, 22:35 EST).

69. The two CBAs associated with stadium developments include the Atlantic Yards project, discussed *infra*, and the new Yankees' Stadium, discussed in Salkin & Lavine, *supra* note 1 and in Yankee Stadium CBA, <http://communitybenefits.blogspot.com/2008/01/yankee-stadium-cba.html> (Jan. 30, 2008, 06:20 EST).

70. See Salkin & Lavine, *supra* note 1; Columbia Expansion CBA, <http://communitybenefits.blogspot.com/2008/01/with-atlantic-yards-and-yankee-stadium.html> (Jan. 30, 2008, 06:56 EST).

71. See Salkin & Lavine, *supra* note 1; Bronx Terminal Market CBA, <http://communitybenefits.blogspot.com/2008/01/bronx-terminal-market-cba.html> (Jan. 29, 2008, 15:32 EST).

campaigns are currently underway in the Bronx and in Albany.<sup>72</sup> The following two case studies highlight two current controversial development projects: the Atlantic Yards arena project and the Columbia University expansion.

### 1. Atlantic Yards

The first New York CBA<sup>73</sup> was completed in 2005 in relation to the multi-billion dollar Atlantic Yards arena project, future home to the New Jersey Nets. In addition to the basketball arena, the proposal includes an attached residential and office complex to be made up of several high-rise buildings that will radically alter Brooklyn's skyline.<sup>74</sup> Since its inception, the project has faced broad opposition from Brooklyn residents, primarily because the project is to involve the use of eminent domain.<sup>75</sup>

The Atlantic Yards CBA was negotiated by eight community groups<sup>76</sup> and was purportedly based on the Staples Center agree-

---

72. See 'It's Our Armory,' Declares Bronx Community; Elected Officials, Labor, Community and Religious Leaders Demand Armory Developer Sign Community Benefits Agreement, PR NEWswire, Oct. 27, 2007; *Meeting of Minds Ends Push for Protest*, TIMES UNION (Albany, N.Y.), Oct. 5, 2007, at D3.

73. Atlantic Yards was at least the first New York CBA to be identified as such. In 2001, Donald Trump entered into a rather CBA-like agreement in order to get approval to develop Riverside Park South (located on the western side of Manhattan). The deal was made with six non-profit civic groups and requires the developer to fund the creation and maintenance of a twenty-one acre park. See *Parks Reclaims Manhattan Waterfront Property*, 16 THE DAILY PLANT 3341 (N.Y.C. Dep. of Parks & Recreation, New York, N.Y.), Apr. 11, 2001, available at [http://www.nycgovparks.org/sub\\_newsroom/daily\\_plants/daily\\_plant\\_main.php?id=9125](http://www.nycgovparks.org/sub_newsroom/daily_plants/daily_plant_main.php?id=9125).

74. See Mayor Bloomberg, Forest City Ratner CEO, President Ratner, Civic Leaders Sign Community Benefits Agreement, US STATE NEWS, June 27, 2005.

75. Opposition to the project has spawned several lawsuits and attracted the help of hundreds of New Yorkers and a few local celebrities. See *Develop - Don't Destroy Brooklyn*, <http://www.dddb.net>; *Goldstein v. Pataki*, 516 F.3d 50 (2d Cir. 2008) (dismissing the plaintiffs' eminent domain challenge). The project has also spurred the creation of several blogs devoted to dismantling the developer's claims and exposing a more realistic projection of the development's likely impacts. See, e.g., Nicholas Confessore, *A Blogfest Over a Project in Brooklyn*, N.Y. TIMES, Apr. 16, 2006, available at <http://www.nytimes.com/2006/04/16/nyregion/16yards.html>; Atlantic Yards Report, <http://atlanticyardsreport.blogspot.com>; noLandGrab, <http://www.nolandgrab.org>. Journalist and blogger Norman Oder of the Atlantic Yards Report has become a veritable expert on the project, often picking up details missed by the mainstream media.

76. The groups involved in the negotiations were the Faith in Action, the Association of Community Organizations for Reform Now (ACORN), Brooklyn United for Innovative Local Development (BUILD), Brooklyn Voices for Children, the Downtown Brooklyn Neighborhood Alliance (DBNA), Brooklyn Endeavor Experience (BEE), the New York State Association of Minority Contractors (NYSAMC) and the Public Housing Communities (PHC). Atlantic Yards Community Benefits

ment. It includes affordable housing, living wage, first source, and minority hiring provisions, a commitment to build a day care center, and the perk of free basketball tickets for neighborhood residents.<sup>77</sup>

The CBA includes a number of important benefits, but actual and perceived improprieties in the negotiating process have spurred negative reactions to the agreement.<sup>78</sup> Critics have pointed out that several of the coalition's member groups were created expressly for the purpose of negotiating the agreement.<sup>79</sup> Numerous other community groups expressed opposition to the development and to the CBA, claiming that the developer never had any intention of bargaining in good faith.<sup>80</sup> One of the coalition's member groups also reported receiving \$5 million from the developer, creating a conflict of interest that has clearly tarnished the CBA's integrity.<sup>81</sup> Additionally, several chairpersons from local community boards protested statements made by the devel-

---

Agreement, <http://www.atlanticyards.com/html/community/cba.html> (last visited Mar. 14, 2007).

77. See Mayor Bloomberg, Forest City Ratner CEO, President Ratner, Civic Leaders Sign Community Benefits Agreement, *supra* note 74. Some of the promises made in the agreement include a provision to give hiring preference to low and moderate income area residents and a requirement that thirty-five percent of jobs go to minorities. Atlantic Yards Community Benefits Agreement at § V, available at <http://www.atlanticyards.com/downloads/cba.pdf>. Fifty percent of the proposed rental units are to be affordable and the development will include a health and day care center. *Id.* at §§ VI-VII. More than fifty tickets will be donated to people in the community annually, with priority given to children and seniors. *Id.* at § VII (E). The project also includes eight acres of open space. *Id.* at § VII (D).

78. For praise of the CBA, see, e.g., Nicholas Confessore, *To Build Arena in Brooklyn, Developer First Builds Bridges*, N.Y. TIMES, Oct. 14, 2005, available at <http://www.nytimes.com/2005/10/14/nyregion/14yards.html?ex=1286942400&en=1d1165c2fb2c214f&ei=5090&partner=rssuserland&emc=rss%20target->. For other articles that offer more mixed views, see, e.g., Chris Smith, *Mr. Ratner's Neighborhood*, N.Y. MAG., Aug. 7, 2006, available at <http://nymag.com/news/features/18862/>; Jennifer Egan, Op-Ed., *A Developing Story*, N.Y. TIMES, Feb. 24, 2007, available at [http://www.nytimes.com/2007/02/24/opinion/24egan.html?\\_r=1&oref=slogin](http://www.nytimes.com/2007/02/24/opinion/24egan.html?_r=1&oref=slogin).

79. One news report indicates that only two of the eight signatory organizations were incorporated before the CBA negotiations began. Matthew Schuerman, *Ratner Sends Gehry to Drawing Board*, N.Y. OBSERVER, Dec. 4, 2005, available at <http://www.observer.com/node/38021>.

80. The Pratt Area Community Council, for example, "didn't believe that [the developer] . . . was willing to compromise." And the leader of a group of black ministers expressed a belief that the CBA was merely "meant to buy support with favors." Matthew Schuerman, *supra* note 79 (quotes are from the article's author, not the organizations' representatives).

81. If the conflict of interest wasn't bad enough, the same group, BUILD, was selected to operate the project's job referral program, but it has very little experience conducting similar services. See Matthew Schuerman, *A Cool \$5 Million*, N.Y. OBSERVER, Sept. 29, 2005, available at <http://www.observer.com/term/29768>; Mat-

oper that they had played an advisory role in the negotiations. The chairpersons contended, to the contrary, that their involvement with the CBA ended very early in the process and well before a final draft was prepared.<sup>82</sup> A representative of Good Jobs New York also expressed serious misgivings about the CBA, claiming that the negotiations were “marked by secrecy” and that they “contributed to a fragmentation of community responses.”<sup>83</sup>

It seems that the fundamental problem with the Atlantic Yards CBA is that the coalition has been perceived by many people as not truly representative of the community. A significant portion of Brooklyn residents are opposed to the project due to the extensive impacts that it will have on their neighborhoods,<sup>84</sup> and because they were not invited to participate in negotiations. Rather, the talks were led by community members who were seemingly already on the developer’s side.<sup>85</sup> Without input from

---

thew Schuerman, *Ratner Sends Gehry to Drawing Board*, N.Y. OBSERVER, Dec. 4, 2006, available at <http://www.observer.com/node/38021>.

82. Norman Oder, Atlantic Yards Report, CBs say Ratner “Overstates our Participation” in Community Benefits Agreement, <http://atlanticyardsreport.blogspot.com/2006/05/cbs-say-ratner-overstates-our.html> (May 4, 2006, 12:04 EST).

83. Comments by Bettina Damiani, Project Director, Good Jobs New York, before the New York City Council Committee on Economic Development on the proposed Brooklyn Atlantic Yards project (May 16, 2005), [http://www.goodjobsny.org/testimony\\_bay\\_5\\_05.htm](http://www.goodjobsny.org/testimony_bay_5_05.htm). At least one community group has been particularly vehement in criticizing the Atlantic Yards CBA, calling it “a sham and a fraud that reaches new lows in killing community participation[.]” Press Release, Develop—Don’t Destroy, Ratner “Community Benefits Agreement” (CBA) is DOA and Brooklyn Community Board Chairs Helped Kill It (Nov. 18, 2004), available at <http://dddb.net/php/press/pdfs/111804CBAdoa.pdf>.

84. See *Develop Don’t Destroy Brooklyn*, [www.dddb.net](http://www.dddb.net); *Develop Don’t Destroy Brooklyn v. Urban Development Corp.*, 2008 N.Y.Misc. LEXIS 551 (2008) (dismissing plaintiffs’ claims under the State Environmental Quality Review Act that the project would have substantial adverse environmental effects on the area).

85. As was explained by Bettina Damiani, the project director of Good Jobs New York (which is affiliated with Good Jobs First):

Perhaps the most striking [difference] is that elsewhere CBAs are negotiated by one broad coalition of groups that would otherwise oppose a project, a coalition that includes labor and community organizations representing a variety of interests. The coalition hammers out its points of unity in advance and then each member holds out on settling on its particular issue until the issues of the other members are addressed. This way, the bargaining power of each group is used for the benefit of the coalition as a whole. In the Brooklyn Atlantic Yards (BAY) case, several groups, all of which have publicly supported the project already, have each engaged in what seem to be separate negotiations on particular issues. Damiani, *supra* note 83.

In more colorful language, Jordi Reyes-Montblanc, a community board member involved with the Columbia CBA (discussed below), has stated that “Ratner and the city got together with one big, national not-for-profit and a set of local sycophants

the stakeholders who have the most concerns about the project's effects on the community, the CBA is likely weaker than it otherwise might have been. Interestingly, another Brooklyn community group lobbied the developer to reopen the CBA for further negotiations in 2006. The developer refused, but offered instead to consider a second agreement to be called a "Neighborhood Benefits Agreement." Little seems to have come of this initiative.<sup>86</sup>

Construction of the Atlantic Yards arena has been significantly delayed by litigation over the proposed condemnations needed to enable the project to continue,<sup>87</sup> and the major provisions of the CBA have yet to be implemented.<sup>88</sup> The developer did ad-

---

and put something together which doesn't seem to have satisfied too many people, except for those who are benefiting directly from it." Matthew Schuerman, *Mr. Bolinger's Battle: Can Harlem and Colombia Ever Agree on the Benefits of a Bigger Campus*, N.Y. OBSERVER, Feb. 18, 2007, available at <http://www.observer.com/node/36744>.

It should also be noted that the developer was able to avoid New York City's comprehensive public review process because the project is being built on state-owned land. This has provided additional reason for project opponents to believe that the developer did not intend to engage in any meaningful dialogue with the community about the plans. See *Doctoroff's Disaster*, BROOKLYN PAPER, Dec. 15, 2007, available at [http://www.brooklynpaper.com/stories/30/49/30\\_49editorial.html](http://www.brooklynpaper.com/stories/30/49/30_49editorial.html).

86. Norman Oder, Times Ratner Report, *After the CBA, Will Ratner Negotiate a Neighborhood Benefits Agreement?*, <http://timesratnerreport.blogspot.com/2006/01/after-cba-will-ratner-negotiate.html> (Jan. 6, 2006, 07:45 EST); e-mail communication with Norman Oder, Reporter, Atlantic Yards Report (Jan. 29, 2008).

87. However, on February 1, 2008 the Second Circuit Court of Appeals appears to have paved the way for the project to continue in *Goldstein v. Pataki*, 516 F.3d 50 (2d Cir. 2008) (upholding the District Court's dismissal of a complaint filed by fifteen property owners whose homes and businesses were slated for condemnation, finding that the use of eminent domain by the Empire State Development Corporation for the proposed 22-acre Atlantic Yards and Redevelopment Project in and around the Metropolitan Transit Authority's Vanderbilt Yards in the heart of downtown Brooklyn, NY was a valid public use under the Fifth Amendment of the U.S. Constitution). The plaintiffs intend to appeal the case to the United States Supreme Court. Another case brought in relation to the project, *Develop Don't Destroy Brooklyn v. Urban Development Corp.*, 2008 N.Y. Misc. LEXIS 551 (2008), will be heard by a New York appellate court in the fall of 2008. Email communication with Daniel Goldstein, lead plaintiff, Mar. 20, 2008.

88. A recent flier circulated in Brooklyn by the developer describes how the coalition member groups are starting to implement the CBA, but the brochure does not provide particularly detailed information. See Norman Oder, *In Seventh Slick brochure, Forest City Ratner Touts "Historic" CBA*, Atlantic Yards Report, <http://atlanticyardsreport.blogspot.com/2008/03/in-seventh-slick-brochure-forest-city.html> (Mar. 3, 2008, 06:03 EST). The flier notes, for example, that BUILD, one of the coalition groups, is "implementing initiatives to prepare adults and youth for and connecting them to construction and permanent employment opportunities created by Atlantic Yards. . . BUILD is also identifying and providing technical assistance to qualified business owners for contracting, retail, concession and other business op-

vertise that it was seeking an Independent Compliance Monitor in 2007, as required by the CBA, but some have questioned just how independent the monitor will be.<sup>89</sup>

Recent news that the Atlantic Yards project may be facing serious financial difficulties has also raised questions about whether “it was reasonable to expect the benefits from the Community Benefits Agreement when it was signed[.]”<sup>90</sup> Forest City Ratner has indicated that it will continue construction work on the arena, but plans for many of the project’s other buildings appear to have been indefinitely delayed—including the affordable housing, retail and office space that were key components of public and governmental support for the project.<sup>91</sup> The CBA does not require any minimum amount of affordable housing to be built,<sup>92</sup> and the possibility that very little will be built in the near future has made apparent a significant shortcoming of the agreement.

One upside of the Atlantic Yards situation is that with so many people opposed to the project and the manner in which the CBA was made, there will likely be some heightened public scrutiny of the developer’s compliance with its agreements.<sup>93</sup> Moreover,

---

portunities created by Atlantic Yards and other development projects.” Another coalition group is “working to help identify qualified contractors for business opportunities relating to the Atlantic Yards Projects.”

89. Norman Oder, Atlantic Yards Report, CBA “Watchdog” Sought to Ensure “History Making” Benefits “for Local Community,” <http://atlanticyardsreport.blogspot.com/2007/03/cba-watchdog-sought-to-ensure-history.html> (Mar. 19, 2007, 07:32 EST).

90. Norman Oder, Atlantic Yards Report, A (somewhat speculative) FAQ on the Atlantic Yards news, <http://atlanticyardsreport.blogspot.com/2008/03/speculative-faq-on-atlantic-yards-news.html>.

91. Charles V. Bagli, *Slow Economy Likely to Stall Atlantic Yards*, New York Times, Mar. 21, 2008, available at [http://www.nytimes.com/2008/03/21/nyregion/21yards.html?\\_r=1&oref=slogin](http://www.nytimes.com/2008/03/21/nyregion/21yards.html?_r=1&oref=slogin). The New York Times’ architecture critic made the point that building the arena without the rest of the development may be worse than building nothing at all: “Postpone the towers and expose the stadium, and it becomes a piece of urban blight—a black hole at a crucial crossroads of the city’s physical history. . . . Without the towers the arena is likely to become an enormous eyesore. . . . [I]ts looming presence will have a deadening impact of a lively area. . . . The atrium, once a vital public space, will be reduced to a barren strip of pavement. No development at all would be preferable to building the design that is now on the table.” Nicolai Ouroussoff, *What Will Be Left of Gehry’s Vision for Brooklyn?*, New York Times, Mar. 21, 2008, available at <http://www.nytimes.com/2008/03/21/arts/design/21atla.html?ref=nyregion>.

92. See [http://www.atlanticyards.com/downloads/mou\\_acorn.pdf](http://www.atlanticyards.com/downloads/mou_acorn.pdf).

93. Norman Oder of the Atlantic Yards Report is more skeptical that implementation will be subject to heightened public scrutiny. He suggests that it will be difficult to measure compliance in many cases. For example, a press release issued by



fears that the Atlantic Yards CBA will establish "bad precedent" for future CBAs have died down somewhat. The Atlantic Yards CBA process has been criticized so much<sup>94</sup> that other New York CBA negotiators have expressly chosen to "avoid[ ] the Brooklyn model."<sup>95</sup>

## 2. Columbia University Expansion

CBA supporters were hoping that an agreement concerning Columbia University's expansion into West Harlem would provide a better model for the future of CBAs in New York. The project, in which Columbia will put up sixteen to eighteen new buildings, is estimated to cost about \$6 billion and is likely to span about twenty years. The project is also expected to create about 6,000 jobs, and "transform a shabby enclave of auto-repair shops, warehouses and small manufacturing plants into a pedestrian-friendly environment with more open space, restaurants and shops." Columbia also argues that the expansion is necessary to its educational mission, as it is now cramped and its spread-out facilities do not allow it to be as competitive as universities such as Harvard and Princeton.<sup>96</sup>

The City and Mayor Bloomberg have been especially supportive of Columbia's interest in creating a CBA, providing funds and technical assistance for the negotiating process.<sup>97</sup> The process, in this case, was also markedly different than the other New York CBAs from the start.<sup>98</sup> Rather than being driven primarily by the developers or elected officials, County Board 9 authorized the creation of a local development corporation (LDC) to be

---

the developer stating that a certain number of people have received job training might be difficult to validate. E-mail communication, Jan. 29, 2008.

94. See, e.g., Damiani *supra* note 83; Patrick Arden, *City's Brand of CBA, Bad for Rest of Nation?*, METRO NEW YORK, Jan. 14, 2008, available at [http://ny.metro.us/metro/local/article/Citys\\_brand\\_of\\_CBA\\_bad\\_for\\_rest\\_of\\_the\\_nation/11409.html](http://ny.metro.us/metro/local/article/Citys_brand_of_CBA_bad_for_rest_of_the_nation/11409.html).

95. Whether other New York CBA models have proved much better than the Atlantic Yards approach is another matter. See Mathew Schuerman, *Ratner-Style dear with Colombia University?*, N.Y. OBSERVER, Aug. 15, 2005, available at <http://www.observer.com/node/33803>.

96. Judith Messina, *Colombia Expansion Forges Ahead, Despite Opposition*, CRAIN'S NEW YORK BUSINESS.COM, Dec. 22, 2007, available at <http://www.crainsnewyork.com/apps/pbcs.dll/article?AID=/20071223/FREE/303249700/1010/toc>

97. The city appointed attorney Jesse Masyr, who represented the developer in the Bronx Terminal Market CBA to work pro bono for the Columbia Local Development Corporation, and the city's Economic Development Corporation has contributed \$350,000 to pay for a mediator and other expenses. Matthew Schuerman, *Mr. Bollinger's Battle*, *supra* note 85.

98. *Id.*

composed of appointed community leaders representing a broad range of constituents.<sup>99</sup> Public meetings began in September 2006 and continued on a weekly basis with working groups devoted to housing, business and economic development, employment, education, historic preservation, community facilities and social services, arts and culture, environmental stewardship, transportation, research and laboratory activities and green spaces.<sup>100</sup>

Although the Community Board originally intended that the LDC would not include any elected officials, after the LDC's first meeting it reconsidered this decision.<sup>101</sup> However, including elected officials proved detrimental to the process, as perceptions arose that these individuals were not representing the true interests of the community and that they were inappropriately controlling negotiations. Moreover, Columbia did not have any representatives on the LDC and was not very involved with the negotiations.<sup>102</sup>

The situation took a turn for the worse in November 2007 when three members of the LDC resigned, citing conflicts of interest among the elected officials on the board and a lack of transparency in the negotiations.<sup>103</sup> Two other members resigned

99. Transcript, West Harlem Development Corporation, Community Forum at 8 (Sept. 30, 2006), available at [http://www.westharlemldc.org/uploads/transcript\\_093006.pdf](http://www.westharlemldc.org/uploads/transcript_093006.pdf). The LDC's mission was to "win support of and leverag[e] the community-base planning of Community Board 9, provide an organizational structure to focus community input in order to negotiate and monitor a community benefits agreement with developers of large scale developments in Community District 9 in a manner that is both transparent and accountable to the West Harlem community. . . ." *Id.*

100. See West Harlem Local Development Corporation, Working Groups, [http://www.westharlemldc.org/Community\\_Benefits\\_Agreemen.html](http://www.westharlemldc.org/Community_Benefits_Agreemen.html) (last visited Mar. 14, 2007).

101. Schuerman, *Mr. Bollinger's Battle*, *supra* note 85, at 24. As one of the LDC's board members explained, "[i]t was absolutely clear to us. . . that if we didn't include [elected officials] on the board as voting members, that we would be doing so at our own peril[.]" *Id.*

102. Telephone interview with Nick Sprayregen, former member of the LDC (Jan. 31, 2008).

103. Daniel Amzallag, *Three Members Resign From LDC*, COLUMBIA SPECTATOR, Nov. 29, 2007, available at <http://www.columbiaspectator.com/?q=node/28368>. Tom DeMott, one of the resigning members and a representative of tenants groups, stated that negotiating sessions were held without his being informed of them, and Nick Sprayregen, the largest property owner in the project's footprint, complained that the CBA was a "sell-out of the community. . . that represents something that is not what the community wants." Matthew Schuerman, *Resignations Over Columbia Harlem Expansion*, N.Y. OBSERVER, Nov. 29, 2007, available at <http://www.observer.com/2007/will-columbia-three-get-any-respect>.

shortly thereafter, claiming that there had been misrepresentations and secrecy.<sup>104</sup> These resignations left the LDC with fifteen members, of which seven were elected officials.<sup>105</sup>

Despite these troubles, a memorandum of understanding<sup>106</sup> was completed in December 2007 just in time for the City Council to approve of the expansion plan and Columbia's request for rezoning.<sup>107</sup> The agreement commits Columbia to providing \$150 million in benefits, including \$30 million for a university-run public school, \$20 million of in-kind services and \$24 million for an affordable housing trust fund. But the bulk of the money, \$76 million, was set aside for as-yet undetermined community programs to be implemented over the next twelve years. The agreement has been described as "one-and-a-half non-legally binding pages," and criticism has been directed at the LDC for rushing the CBA process and punting the specifics of the agreement to a later date.<sup>108</sup>

It appears as though the Columbia CBA negotiations began in good faith, with intentions to be as inclusive of divergent community interests as possible. Regardless of the LDC's continuing pledges of support for community interests, by some accounts it has not succeeded in instilling much faith in its efforts among Harlem residents. The resignations and hastily drawn up agreement have not helped. Nor has the controversy about the use of eminent domain and the possibility of gentrification in the area.<sup>109</sup> Even though Columbia did agree last fall that it would not seek to evict any residents through the use of eminent do-

---

104. Daniel Amzallag, *Community Benefits Agreement Will Include School, Funds for Affordable Housing*, COLUMBIA SPECTATOR, Dec. 20, 2007, available at <http://www.columbiaspectator.com/node/28615>.

105. Patrick Arden, *City's Brand of CBA Bad for Rest of the Nation?*, METRO, Jan. 14, 2008, available at [http://ny.metro.us/metro/local/article/Citys\\_brand\\_of\\_CBA\\_bad\\_for\\_rest\\_of\\_the\\_nation/11409.html](http://ny.metro.us/metro/local/article/Citys_brand_of_CBA_bad_for_rest_of_the_nation/11409.html).

106. Memorandum of Understanding between the West Harlem Local Development Corporation and Columbia University on Columbia University's Financial Commitment to Community Benefits (Dec. 19, 2007), available at <http://amy.m.lavine.googlepages.com/MOU-12.19.07.pdf>.

107. Daniel Amzallag, *Community Benefits Specifics Remain Up in the Air*, COLUM. SPECTATOR, Jan. 22, 2008, available at <http://www.columbiaspectator.com/node/28669>.

108. *Id.*; Timothy Williams & Ray Rivera, *Columbia Expansion Gets Green Light*, N.Y. TIMES, Dec. 20, 2007, available at <http://www.nytimes.com/2007/12/20/nyregion/20columbia.html?ref=us>.

109. Daniel Amzallag, *In and Out of Expansion Zone, Development Booms in Harlem*, COLUM. SPECTATOR, Jan. 22, 2008, available at <http://www.columbiaspectator.com/node/28693>.

main, some residents have expressed displeasure with the relocation provisions and it is still unknown what will happen to local businesses. The prospect that eminent domain will be used at all has been viewed negatively by many in the neighborhood, including some who support the expansion, creating tension over the CBA.

Nevertheless, Columbia may still resolve the eminent domain issue with the few remaining business owners in the expansion area,<sup>110</sup> and the finalized CBA may deal with the uncommitted \$76 million in a manner that is satisfactory to most of the community. The difficulties surrounding the CBA, moreover, should not eclipse the fact that the agreement does commit Columbia to providing extensive benefits to the community.

### C. Other Notable CBAs

While the volume of existing CBAs and current negotiations over new CBAs are most prevalent in California and New York, interest in using CBAs is spreading throughout the country. Proposed expansion projects for institutions of higher education,<sup>111</sup> the creation of a municipal-wide wireless internet access program,<sup>112</sup> brownfields remediation projects,<sup>113</sup> stadiums<sup>114</sup> and housing initiatives<sup>115</sup> have all provided the impetus for CBA negotiations. Some of the states where these CBAs are developing authorize development agreements, but most do not.<sup>116</sup> The

---

110. Daniel Amzallag, *Three Private Property Owners Hold Out in Negotiations*, COLUM. SPECTATOR, Jan. 22, 2008, available at <http://www.columbiaspectator.com/node/28671>.

111. For example, the Yale University campus. See Salkin & Lavine, *supra* note 1, and Amy Lavine, Yale-New Haven CBA, <http://communitybenefits.blogspot.com/2008/01/yale-new-haven-cba.html> (Jan. 30, 2008, 13:30 EST).

112. Minneapolis Digital Inclusion CBA. See Salkin & Lavine, *supra* note 1, and Amy Lavine, Minneapolis Digital Inclusion CBA, <http://communitybenefits.blogspot.com/2008/01/minneapolis-digital-inclusion-cba.html> (Jan. 30, 2008, 15:49 EST).

113. For example, see Salkin & Lavine, *supra* note 1, and Amy Lavine, Gates-Cherokee Redevelopment CBA, <http://communitybenefits.blogspot.com/2008/01/gates-cherokee-redevelopment-cba.html> (Jan. 30, 2008, 16:22 EST).

114. A new arena for the Penguins in Pittsburgh. See Salkin & Lavine, *supra* note 1, and Amy Lavine, Penguins Update, [http://communitybenefits.blogspot.com/2008/02/penguins-update\\_05.html](http://communitybenefits.blogspot.com/2008/02/penguins-update_05.html) (Feb. 5, 2008, 06:34 EST).

115. For example, the Shaw District in Washington, D.C. See Salkin & Lavine, *supra* note 1, and Amy Lavine, Washington D.C. Shaw District CBA, <http://communitybenefits.blogspot.com/2008/01/washington-dc-shaw-district-cba.html> (Jan. 30, 2008, 18:40 EST). Another example is the proposed redevelopment of Cramer Hill in New Jersey. Salkin & Lavine, *supra* note 1.

116. See *supra* note 6 and accompanying text (noting that the states that currently authorize development agreements include Arizona, California, Colorado, Florida,

community groups beginning to experiment with CBAs are located around the country. Stakeholders in Albany (New York),<sup>117</sup> Atlanta,<sup>118</sup> Pittsburgh,<sup>119</sup> Charleston (South Carolina),<sup>120</sup> Miami,<sup>121</sup> Milwaukee,<sup>122</sup> San Francisco,<sup>123</sup> Santa Rosa (California),<sup>124</sup> Seattle,<sup>125</sup> Syracuse (New York),<sup>126</sup> the Twin Cities,<sup>127</sup> and Wilmington (Delaware),<sup>128</sup> for example, have completed CBAs or are currently trying to initiate negotiations.

---

Hawaii, Louisiana, Nevada, New Jersey, Oregon, South Carolina, Virginia, and Washington).

117. See Community Benefits Proposal, <http://www.ariseorg.net/cba10-15-05.html> (last visited Mar. 14, 2007); see also Michael DeMasi, *Neighborhood Groups Seek Benefit Package from Convention Center Developer*, BUS. REV. (Albany, NY), Jan. 30, 2006, available at <http://www.bizjournals.com/albany/stories/2006/01/30/daily4.html>; Robert Gavin, *Jobs Plan Draws Praise; County Lawmaker Encouraged by Sen. Schumer Proposal to Fight Joblessness Among Black Males*, TIMES UNION (Albany, NY), Nov. 21, 2007.

118. See Atlanta City Council Approves BeltLine Tax Allocation District, CITY NEWSBYTES, Nov. 8, 2005, available at [http://www.atlantaga.gov/media/citynewsbytes\\_110805.aspx](http://www.atlantaga.gov/media/citynewsbytes_110805.aspx); Georgia Stand-up, Community Benefits 101, [http://www.gas-standup.org/community\\_benefits.html](http://www.gas-standup.org/community_benefits.html).

119. See Salkin & Lavine, *supra* note 24; Penguins arena, <http://communitybenefits.blogspot.com/2008/01/penguins-arena.html>.

120. See Community Benefits Agreements, CHARLESTON BUS. J., Apr. 18, 2005, available at [http://www.charlestonbusiness.com/pub/11\\_8/news/4353-1.html](http://www.charlestonbusiness.com/pub/11_8/news/4353-1.html).

121. See Tides Foundation, Bridging the Economic Divide, <http://www.tidesfoundation.org/services-strategies/tides-initiatives/bridging-the-economic-divide/bed-strategies-in-action/index.html> (last visited Mar. 14, 2007).

122. See Salkin & Lavine, *supra* note 24; Milwaukee Park East Redevelopment CBA, <http://communitybenefits.blogspot.com/2008/01/milwaukee-park-east-redevelopment-cba.html>.

123. See Lennar Construction Workshops Providing Valuable Advice to Community, Construction Workers and Business, BUS. WIRE, July 24, 2007.

124. See New Economy Working Solutions, <http://www.neweconomynorthbay.org/programs.php#acco>.

125. See Real Change News.org, *Say Yes to Responsible Development*, [http://www.realchangenews.org/2006/2006\\_11\\_29/firstthingsfirst.html](http://www.realchangenews.org/2006/2006_11_29/firstthingsfirst.html) (last visited Mar. 14, 2007); Sharon Pian Chen, *Local Activists Want Developers To Provide Community Benefits, Too?*, SEATTLE TIMES, Dec. 6, 2006.

126. See Mark Spadafore, Syracuse Alliance for a New Economy: A Year of Growth and Partnership for Central New York, <http://communitybenefits.org/article.php?id=983> (last visited Feb. 22, 2008); *Community Benefits: New Group Wants to be Ready when Developers Come Knocking*, POST STANDARD (Syracuse, NY), Sep. 3, 2007.

127. See Minneapolis Digital Inclusion CBA, Salkin & Lavine, *supra* note 24, and Amy Lavine, Minneapolis Digital Inclusion CBA, <http://communitybenefits.blogspot.com/2008/01/minneapolis-digital-inclusion-cba.html> (Jan. 30, 2008, 15:49 EST); Longfellow CBA, <http://communitybenefits.blogspot.com/2008/03/longfellow-cba.html>; Harrison Neighborhood, Minneapolis CBA, <http://communitybenefits.blogspot.com/2008/02/harrison-neighborhood-minneapolis-cba.html>.

128. See Peninsula Compost Co. CBA, <http://communitybenefits.blogspot.com/2008/03/peninsula-compost-co-cba.html>.

CBAs are also appearing outside of the U.S. in cities, including Toronto and Dublin.<sup>129</sup>

Recent developments on the West Coast indicate that the CBA concept may be changing. In 2007, Tesco, a British grocery chain and the world's third largest retailer, announced plans to open hundreds of neighborhood markets in California and other western states. A coalition was quickly formed to demand a CBA, primarily because Tesco does not have a unionized workforce. Tesco has shown no interest in negotiating, despite media pressure and threats of a boycott from community and labor groups.<sup>130</sup> Tesco has argued that a CBA is unnecessary because it already provides well-paying jobs, has environmentally-friendly policies and has pledged to locate stores in underserved areas. It has asked the public to allow it "to begin a relationship based on [its] deeds[.]" implying that pressuring it to sign a CBA would be "no way to build trust between neighbors."<sup>131</sup> The situation is notable because the coalition has relied primarily on its ability to influence consumers for leverage, and not on its ability to provide support in the land development approval process. Tesco does not seem to believe that refusing to negotiate a CBA will interfere with its business, which underscores a fundamental weakness of CBAs—they may not work when the developer does not believe that it needs them.<sup>132</sup>

129. Laurie Monsebraaten, *Advisor Warns Residents to Avoid 'Divide and Conquer' Tactics*, TORONTO STAR, May 10, 2007, at R04.

130. See, e.g., Jerry Hirsch, *Activists Protest Tesco's Fresh & Easy*, LOS ANGELES TIMES, Nov. 27, 2007, at 3.

131. Simon Uwins, *Fresh & Easy Promises Accountability and Social Responsibility*, LOS ANGELES BUS. J., Nov. 26, 2007.

132. A similar, less widely publicized campaign is being waged against Western Union. In opposition to practices that it believes to be harmful to immigrant communities that rely on money transferring services, the Transnational Institute for Grassroots Research and Action (TIGRA) sought to obtain an agreement from Western Union that it would reduce its fees, provide a fair exchange rate, commit a portion of its revenues to a community reinvestment fund and adopt human rights screens in its investment practices. After Western Union refused to negotiate such a "Transnational Community Benefits Agreement," TIGRA called for a worldwide boycott, which is currently ongoing. See TIGRA, *About the Campaign*, <http://www.boycottwesternunion.net/En/about.html> (last visited Feb. 22, 2008); Andrea Chang, *Groups Boycott Western Union; Immigrant Advocates Say it Charges Exorbitant Fees for Money Transfers While Failing to Reinvest in the Community*, LOS ANGELES TIMES, Sep. 11, 2007. In January 2008, Western Union filed a challenge against a shareholder resolution calling for an agreement with the Securities and Exchange Commission, making it less likely that any agreement will be reached in the near future. See TIGRA, *Western Union Fights Community Reinvestment Proposal by Shareholders*, <http://www.boycottwesternunion.net/En/timeline.html> (last visited Feb. 22, 2008).

## V.

## PRACTICAL PROBLEMS WITH CBAS

CBAs have proven to be effective tools for many communities hoping to obligate developers to provide amenities to the neighborhoods that they affect. However, negotiating a CBA may not be appropriate in all situations,<sup>133</sup> and experience with CBAs has shown that negotiating these agreements can be a difficult task. The following discussion attempts to discern several of the most common practical problems with CBAs.

*A. Community Organizing*

The first step of any campaign is to start a CBA coalition.<sup>134</sup> But community organizing is not easy. It takes money and strong leadership, both of which may be difficult to find.

The coalition negotiating on behalf of the community must be representative of the community's residents and property owners to retain and enhance its political capital. Ideally, it should be inclusive of all interests that may be impacted by the proposed development. As the experiences with Atlantic Yards and Columbia illustrate, a CBA coalition that leaves out stakeholders may not be fully accepted by the community. For this reason, community organizers need to take an active role in seeking out community participants. Some of the best CBA campaigns have involved posting flyers, sending out mailers, and going door-to-door, in addition to speaking with already established community groups and holding public meetings.<sup>135</sup>

---

133. See Madeline Janis-Aparicio & Roxana Tynan, *Power in Numbers: Community Benefits Agreements and the Power of Coalition Building*, SHELTERFORCE ONLINE (Nov./Dec. 2005), available at [http://www.laane.org/pressroom/stories/community\\_benefits/cbNovDec2005shelterforce.html](http://www.laane.org/pressroom/stories/community_benefits/cbNovDec2005shelterforce.html).

134. See David Marcello, *A "Concentric Circles" Model for Organizing Community Benefits Agreements*, TULANE PUBLIC LAW CENTER, Mar. 15, 2007, available at <http://www.law.tulane.edu/WorkArea/showcontent.aspx?id=5746>.

135. One example of a CBA campaign that has involved this type of active community organizing is the Minneapolis Digital Inclusion CBA. The Digital Inclusion Advisory Team collected information about the needs and desires of the community through individual and community surveys, community/stakeholder sponsored meetings, neighborhood meetings, telephone, email and mail inputs, city sponsored meetings and open houses. This information was synthesized into priorities and relayed to the Digital Inclusion Advisory Team, one of six community teams that were formed to advise the negotiating team. For more information about the CBA and community organizing process, see The Digital Access Project, <http://www.digitalaccess.org/>, and particularly the Wireless Minneapolis Digital Inclusion Task Force Final Report, available at <http://www.digitalaccess.org/documents/MDITF%20complete.pdf>.

The next step for a coalition is to formulate its priorities. For a broad-based coalition, this may be the hardest part of making a CBA. Community groups with different agendas will inevitably have to compromise over the benefits to be sought, and internal politics may arise within the coalition, making cooperation and unity difficult. One way for a coalition to stay cohesive in its goals is to conduct thorough surveys of the community to assess its needs. This type of research can be costly and time consuming, but it may be worthwhile.

Another method for large and diverse coalitions to build cohesiveness is the development of a "Community Benefits Coalition Operating Agreement" and a list of "Coalition Operating Principles." This type of operating agreement defines membership qualifications, addresses how collective decisions will be made, outlines procedures for dealing with conflicts of interest, and addresses other coalition issues. The process of developing these guiding documents will help a coalition to formulate its goals and will introduce a measure of formality into the coalition's working order that can help to prevent internal disputes. The Public Law Center at Tulane Law School has produced a model Coalition Operating Agreement and Principles,<sup>136</sup> as well as guidance for using them.<sup>137</sup>

#### B. *Bargaining Power and Bargaining Tactics*

For a CBA to be fair and effective, it is necessary that the community negotiating the CBA have adequate leverage to obtain meaningful promises from a developer. In some situations, a developer's need to locate the project in a specific place or the possibility of obtaining public subsidies will provide a large amount of leverage to community groups. As the executive director of the Los Angeles Community Redevelopment Agency has remarked, CBAs "work best when there is substantial agency money invested, when they're big projects, and when they're in hot markets or emerging markets."<sup>138</sup> When these elements are missing, CBAs are often criticized as creating development barriers that encourage developers to simply find other, less costly,

---

136. Community Benefits Coalition Operating Agreement, <http://www.law.tulane.edu/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=5750>.

137. Marcello, *supra* note 134.

138. See Meyerson, *supra* note 9.



locations.<sup>139</sup> This does not mean that CBAs will not work in such situations, but coalitions may have more difficulty convincing developers to negotiate.

When developers do choose to engage in talks with community groups, they may persist in attempts to weaken the coalition's bargaining power. The "divide and conquer" techniques used by developers to balkanize coalitions require community groups to be united and to have coherent goals. Otherwise, a developer may attempt to appease some community groups without meeting others' needs—to "buy off" the minimum number of stakeholders to be able to spin the project as being community-supported.<sup>140</sup> As the Atlantic Yards case shows, such tactics may be used before a coalition has even formed, making a cohesive community response especially difficult. When a coalition has already formed, it may protect itself against such tactics by requiring coalition members to agree not to bargain separately with the developer.<sup>141</sup> In other cases, fragmentation of a coalition may be caused indirectly by the benefits that the developer is or is not willing to put on the table. This is particularly true when negotiations concern controversial developments. For example, the issue of eminent domain led to the resignation of a number of members from the Columbia negotiating team who refused to compromise.<sup>142</sup>

While developers may try to damage coalitions' reputations or seek to win over constituent groups, CBA coalitions have developed some tactics of their own to boost their bargaining power. From the start, coalitions must develop a language to frame the issues in their favor. This often involves emphasizing positive visions of the community's future, win-win solutions, inclusiveness, the grassroots character of the campaign and the nature of the CBA as fostering equitable development rather than preventing

---

139. See The Partnership for Working Families and Spin, *Words that Work: Communications Messaging for Community Benefits Agreements* 10 (2007) available at [http://www.communitybenefits.org/downloads/CB%20Communications%20Toolkit\\_1.pdf](http://www.communitybenefits.org/downloads/CB%20Communications%20Toolkit_1.pdf) (noting that "Chambers of Commerce typically argue that Community Benefits advocates are hostile to business. Their classic argument is that tax revenues and jobs will be lost").

140. See GROSS, *supra* note 2 at 22; see also Suzette Parmley, *Trump the Best Known City Casino-game Player*, PHILADELPHIA INQUIRER, Dec. 15, 2006 (describing how Donald Trump "pulled five or six 'marginal' groups away from the Multi-Community Alliance. . . and, through deceptive marketing, made it appear as if the entire alliance embraced the project").

141. Community Benefits Coalition Operating Agreement, *supra* note 136.

142. See discussion *supra*, Part IV.B.2.

development altogether.<sup>143</sup> These positions reflect strong social values, and they may draw more community members to the coalition and attract positive media attention. If the strength of a campaign is not enough to convince a developer to bargain, however, some community groups have engaged in more forceful tactics. In New Haven, Connecticut, for example, 800 people marched through the neighborhood on the first anniversary of the coalition's formation to demand negotiations.<sup>144</sup> And, in Pittsburgh, a coalition member publicly burned a copy of a draft CBA offered by the city to protest its vague provisions. The following day, coalition members arranged a bus tour through the neighborhood. Both events were highly publicized.<sup>145</sup>

### C. Money

The costs of negotiating a CBA can be high. Organizing a coalition, holding meetings, conducting community research and preparing reports will all require funding. Coalitions that have no experience with CBAs, moreover, will likely need technical and legal assistance throughout the negotiation process. The funding required for all of this may inhibit the process.<sup>146</sup>

However, resources are available. Beyond the grants and funding programs normally used by community groups, a CBA coalition should take advantage of the talents of neighborhood residents. Volunteers are often willing to hand out surveys, post signs and spread the word about public meetings. Local lawyers and other professionals may be willing to offer their services for free or at a reduced cost. Regional and national organizations such as LAANE and Good Jobs First may also be able to provide information about CBAs and other resources. The faith-based community has also emerged as another source of financial and staff support for these efforts.

---

143. The Partnership for Working Families and Spin, *Words that Work: Communications Messaging for Community Benefits Agreements* 7 (2007).

144. Connecticut Center for a New Economy, Community Organized for Responsible Development (CORD), <http://www.ctneweconomy.org/CORD.html>.

145. See, e.g., Jeremy Boren, *Hill District leaders closer to goal of grocery store*, PITTSBURGH TRIBUNE REV., Jan. 12, 2008; Jeremy Boren, *Hill District Activists Rally*, PITTSBURGH TRIBUNE REV., Jan. 8, 2008; Mark Belko, *Hill Leaders Push for Arena Accord*, PITTSBURGH POST-GAZETTE, Jan. 9, 2008.

146. See GROSS, *supra* note 2, at 23.

#### D. *Enforcement and Monitoring*

Most CBAs include monitoring and enforcement provisions that require coalitions to engage in future activities related to the CBA. For coalitions that formed for the specific purpose of negotiating a CBA, sustaining the energy for monitoring and enforcement may be difficult. Even for established community groups, the test of time may be difficult as the neighborhood changes and populations fluctuate, leading to an evolution of the community's goals and development priorities. Requiring a developer to set aside seed money for the maintenance of a coalition is one way to ensure that the CBA will be monitored. However, conflicts of interest (perceived or actual) may arise if the developer funds enforcement efforts and inadequate assurances of independence are made.<sup>147</sup> Coalitions that are affiliated with larger, established nonprofits like LAANE or SAJE may have an easier time enduring the life of a CBA. Further, legal issues related to enforcement, discussed in the next section, can present significant unanticipated challenges.

### VI.

#### LEGAL ISSUES RELATED TO CBAS

The validity and enforceability of CBAs has yet to be tested in court, but some lawyers have expressed concerns that the agreements may not pass constitutional or contract law requirements.

#### A. *Consideration*

Since CBAs may be analogized to a bilateral contract,<sup>148</sup> chief among the questions as to the validity of CBAs is whether community groups provide any real consideration for these contracts. While supporters argue that a coalition's promise to support a development before land use authorities constitutes sufficient consideration, others have argued that such promises may be considered to be insufficient when compared to the extensive benefits offered by developers.<sup>149</sup> This argument has particular

---

147. See Oder, *supra* note 89 and accompanying text.

148. A bilateral contract represents an exchange of promises and bargained for consideration. See 1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1.23, at 87 (West Publishing 1993) (1963).

149. At a New York panel on CBAs, for example, William Valletta, former general counsel for the New York City planning department asked: "What is the community giving up in order to take part in the agreement? Presumably, they can't sell their vote on their participation in democracy." Matthew Schuerman, *The C.B.A. at*

resonance in cases where community support is, in reality, unnecessary for the developer to obtain needed approvals. Similarly, where the community is fragmented and the developer obtains the support of only one faction, it may be doubted whether the support of such a limited portion of the community actually provided any help to the developer in receiving project approvals or improving its public image.

Under contract theory, which does not generally inquire into the adequacy of consideration, promises not to oppose developments are likely to be deemed supported by consideration.<sup>150</sup> In some cases, CBA coalition members have also made agreements not to bring legal actions to block developments. As “the forbearance of a right to a legal claim,” this would seem to constitute sufficient consideration. “Even if, in hindsight, the legal claim was improbable or nonexistent, ‘it would be enough if at the time of [agreement] [the party] believed in good faith it was vulnerable to a claim by [the other party.]’”<sup>151</sup> The forbearance of legal claims is a stronger basis for consideration than promises to support a development before land use agencies, and it should be included in CBAs whenever possible.

### B. *Standing to Enforce*

Numerous questions have been raised as to who can enforce provisions in a CBA. Because contract law generally permits only contract signatories to enforce a contract, CBA supporters have encouraged coalitions to require each community group to separately sign the agreement. Otherwise, the dissolution of a coalition or the inability to define the coalition’s agents may prevent a CBA from being enforceable.<sup>152</sup>

Where local governments are authorized to enter into development agreements, CBA supporters encourage the incorporation of CBAs into these agreements so that they can be enforced by local governments.<sup>153</sup> In at least one case, a CBA was completely incorporated into a development agreement, with no freestanding CBA signed by community groups. This arrangement is probably not ideal, as complicated legal problems might arise if

---

*Atlantic Yards: But Is It Legal?*, N.Y. OBSERVER, Mar. 14, 2006, available at <http://www.observer.com/node/34377>.

150. 17A AM. JUR. 2D *Contracts* § 124.

151. *Hakim v. Payco-General Am. Credits*, 272 F.3d 932, 935-36 (7th Cir. 2001)

152. GROSS, *supra* note 2, at 23-24.

153. *Id.* at 72.

the coalition were to believe that the developer was in breach but government officials refused to bring an enforcement action.<sup>154</sup>

Whether or not individual community members will be considered third-party beneficiaries capable of enforcing CBAs has not been widely discussed, but some limited precedent exists to support the argument.<sup>155</sup> The third party beneficiary rule generally holds that a person not a party to a contract may nevertheless enforce it if the contract was made directly and primarily for his or her benefit.<sup>156</sup> Still, it may be questioned whether CBAs are intended to benefit individual persons, or whether they are intended to benefit the community at large, thus making individual community members mere incidental beneficiaries incapable of enforcing CBAs. In some cases, the question may be moot, as a number of CBAs specifically disclaim the existence of third party beneficiaries.<sup>157</sup>

Enforceability questions may also center on which parties are bound by developers' promises. Many CBAs contain language indicating an intent that a CBA's provisions will be binding upon the development's future tenants, contractors or buyers. If a CBA does not require these future parties to sign the original CBA or a similar agreement with the developer, community groups may have difficulties enforcing the CBA's terms against developers' subcontractors, tenants and successors in interest.<sup>158</sup>

In states where development agreements are not specifically authorized by state statute, and where a CBA is negotiated between community groups and a government entity engaged in development activities, the coalition needs to be wary that the agreement may not be enforceable against government officials elected in the future. Constitutional questions remain as to

---

154. See Laura Kurtzman, *City Center Project Ok'd - 6-5 Vote Includes Labor-Backed Plans if Developer Agrees to Deal, Shopping, Entertainment District Gets More Affordable Homes, Among Other Things*, SAN JOSE MERCURY NEWS, Dec. 11, 2002, at A1 (quoting City Attorney Rick Doyle as having these concerns). See also Gross, *supra* note 2, at 25.

155. See *Vale Dean Canyon Homeowners Ass'n v. Dean*, 100 Ore. App. 158 (Or. Ct. App. 1990) (holding that members of a homeowners association had third party standing to bring suit against a subdivider that had breached its agreement with the county to improve roads).

156. See, e.g., 17A AM. JUR. 2D *Contracts* § 425.

157. See, e.g., Atlantic Yards Community Benefits Agreement, *supra* note 77, at 51 (stating that "[n]othing in this agreement, express or implied, is intended to confer upon any person other than the parties hereto, and their permitted successors and assigns, any rights or remedies under or by reason of this Agreement").

158. Gross, *supra* note 2, at 71.

whether a court might view long term agreements as a bargaining away of the police power. Local governments are prohibited from contracting away their police powers because to do so would empower one legislative body to bind future legislative bodies.<sup>159</sup>

### C. *Issues Related to the Planning Process*

Because the process of negotiating CBAs often involves local governments or elected officials, CBAs may also raise legal issues related to the propriety of the planning process. Development agreements may provide a framework for incorporating CBAs into this process, but most states do not authorize local governments to enter into these agreements.<sup>160</sup> Thus, in the majority of states, if local governments become involved in the CBA process they may be subject to challenges that such agreements are not authorized by law.

Moreover, when local officials are involved in negotiations, CBAs may begin to look somewhat like disguised exactions, a term used to describe the situation in which local officials improperly condition project approvals on the provision of benefits not closely related to the project's impacts.<sup>161</sup> In accordance with this line of reasoning, some CBA opponents have gone so far as to characterize the agreements as "extortion."<sup>162</sup> Even without invoking the concept of illegal exactions, CBAs created through a process involving local officials may, in some cases, raise questions about conflicts of interests. In these situations, care must be taken so that CBA negotiators are not too involved with planning or other political decisions.

At the same time, local governments may be faulted for not involving themselves enough in CBA negotiations. Under this

159. See JOHN R. NOLON & PATRICIA E. SALKIN, *LAND USE IN A NUTSHELL* 128 (Thomson West 2006).

160. See Callies and Tappendorf, *supra* note 6.

161. See Judith Welch Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C.L. REV. 957, 999-1000 (1987) (noting that the purposes of many development agreements, to provide infrastructure and other public benefits, may "arguably [be] above and beyond that which a local government could exact under the police power"). Whether CBA provisions constitute exactions, however, is dependent on the local government being significantly involved in developing the CBA, and on the provisions not sharing a sufficient nexus with the project. See *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nolan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

162. Schuerman, *Mr. Bollinger's Battle*, *supra* note 85, at 24

view, some argue that local governments should ensure that negotiating teams accurately represent community interests.<sup>163</sup> This may be achieved by a local government facilitating the creation of a CBA bargaining team, as happened with the Columbia University CBA,<sup>164</sup> or by the local government's willingness to take a CBA's comprehensiveness into account when evaluating the developer's application during the land use approval process. These issues will likely become more important as states and municipalities begin to adopt legislation governing CBAs.<sup>165</sup>

## VII.

### CHECKLIST OF ISSUES TO REVIEW IN CONSIDERING THE USE OF CBAS

What follows is a checklist to use in identifying a number of preliminary issues appropriate for consideration when CBAs are contemplated by developers, local governments and/or community groups. The benefits and remedies are typically items that are all "on the table" when negotiating the agreement. In addition, depending upon whether the government is a party to the agreement and/or is assigned responsibilities under the agreement, the threshold question of whether state statutory authority exists for such involvement is critical.

#### *Community Organizing:*

- Is the coalition inclusive of diverse community stakeholders, including faith-based organizations, unions, civic, environmental and social groups, residents' and local business associations and youth groups?
- How have community goals been identified?
  - Through input from coalition members?
  - Public meetings?

---

163. *Id.*

164. See discussion *supra*, Part IV.B.2. Whether or not local governments should be involved in determining who will be part of negotiating teams is a difficult question. A CBA bill recently proposed in Allegheny County, Pennsylvania, was criticized in part because it would give the county too much control over who could negotiate CBAs. Telephone interview with Thomas Hoffman, Pittsburgh UNITED, Mar. 27, 2008.

165. The 2008 report of the Connecticut Responsible Growth Task Force recommended that the state adopt legislation authorizing CBAs. Report of the Responsible Growth Task Force to Governor M. Jodi Rell, at 9 (Feb. 4, 2008), available at [http://www.ct.gov/opm/lib/opm/igp/org/rgtf\\_report\\_2-4-08.pdf](http://www.ct.gov/opm/lib/opm/igp/org/rgtf_report_2-4-08.pdf). CBA legislation has also been proposed in Allegheny County, Pennsylvania (where Pittsburgh is located). See CBA legislation to be discussed in Pittsburgh, <http://communitybenefits.blogspot.com/2008/03/cba-legislation-to-be-discussed-in.html>.

- From active community research, like surveys, door-to-door canvassing and socio-economic studies?
- How have the issues been framed? Can issues of equitable development, the positive prospects for the community, and the ability to create a win-win situation be emphasized to attract more community members and positive press attention?
- Have coalition constituents signed a coalition operating agreement and agreed to a list of operating principles? Are there procedures for choosing negotiators, resolving internal disputes, dealing with conflicts of interest among coalition members, etc.?

DEGC

*Parties:*

- Is there more than one developer?
- How many community groups should/will be parties to the agreement? Will any individuals from the community sign the agreement?
- Is the municipality a party to the agreement?
- Who has the authority to speak for and/or sign for each party?

*Developer Benefits:*

- What are the benefits to the developer?
- Has the coalition agreed not to institute legal action to block the development?
- Are the developer's benefits described in the CBA in a manner that satisfies the consideration requirement of contracts?

*Community Benefits:*

- What benefits will the developer promise the community?
- Is a needs assessment or study required that will determine the extent of the benefits (e.g., the amount of environmental remediation may be based on the results of a study)?
  - Who will finance the assessment?
  - Who will conduct the assessment? Are there safeguards to ensure independence?
- What is the scope of the developer's responsibility or financial obligation?
  - When does it begin and how long does it last?
- Do the obligations transfer to subsequent project owners, or other third parties such as tenants, sub-contractors, or on-site vendors?



*Monitoring:*

- What is the implementation process and timeline?
- How will the process be monitored?
  - Will an individual community organization or committee be responsible for the oversight?
  - Will an independent monitor be hired?
  - How will monitoring be financed? If the developer funds the monitoring, are there safeguards in place to ensure neutrality?
  - How often will monitoring reports be made?
  - How will monitoring reports be made available to the community?
- Is there a process to amend the terms of the benefit or program?

*Enforcement:*

- Is the CBA incorporated into a development agreement?
  - Where development agreements are not authorized by law, does the agreement contain an indication of who may enforce the document on behalf of the community?
- Has the CBA been signed by each individual community group making up the coalition?
- Is there an arbitration or mediation clause?
- Is there a third-party beneficiary clause?

*Remedies:*

- What constitutes a breach on the part of the developer and on the part of the community?
  - Has breach been defined in the contract?
- What are the remedies in the event of a breach?
  - Are the remedies specific to each benefit?
  - Is the right to request specific performance included?
  - Is equitable relief permitted in the event of an irreparable injury?
- Will the other clauses of a CBA remain in effect in the event of a breach?
- What type of notice is required before relief is sought?
- Who is responsible for attorney's fees in the event of a court action?

## VIII.

## CONCLUSION

While CBAs represent an opportunity to accomplish development projects in a manner that achieves social equity and engages community stakeholders in projects with an eye towards designing processes and results that can be win-win for communities and developers, myriad practical and legal issues are present for all involved participants. Land use and municipal attorneys can expect to hear more about these types of agreements, and may be called upon with more frequency to help negotiate and develop CBAs for interested clients. Although the projects highlighted in this article are substantial in scope, much smaller and perhaps simpler CBAs are likely to start appearing in mid-sized and smaller communities across the country.



# MICHIGAN PLANNER



American Planning Association  
Michigan Chapter

Making Great Communities Happen

A Publication of the Michigan Chapter of the American Planning Association

## COMMUNITY BENEFITS AGREEMENTS (CBA'S)

MAP BOARD OF DIRECTORS E-LECTION  
VOTING INSTRUCTIONS, PAGE 2.

AS THE FIELD OF MODERN PLANNING PRACTICE enters its second century in the United States, the tools that serve communities to help plan for development continue to evolve. One area where there has been a great deal of movement during the last decade is around growing the concept of "community benefits," and their legal counterpart, enforceable *Community Benefits Agreements*, or CBA's for short.

FROM LOS ANGELES TO NEW YORK CITY and from New Orleans to Minneapolis-St. Paul, community advocates from across the country are organizing and engaging in the development process at a high level to benefit their neighborhoods and hold projects to higher standards. Oftentimes, the result is a contract between a community and a developer, especially in cases where large projects take advantage of public resources, such as tax abatements and public financing.

This issue takes a look into CBA's through a series of related articles that will broadly consider both community benefits and established agreements from various perspectives. These articles will highlight certain tools that might be implemented as practice, and not just in response to large projects like an arena or an international border crossing in our state's biggest city, but in communities throughout Michigan.

The first article frames how CBA's fit into the overall development picture in Michigan. In terms of gauging neighborhood response to a development's impact, what do we mean when we say "host community"? What are the elements that make up an impacted community? Furthermore, how does a community respond to development from an organizational perspective? And are



**COMMUNITY PLANNING**

**PLANNING MICHIGAN 2014**  
**October 8-10 | Mackinac Island**

National speakers and industry leaders discuss timely issues including what's big in small towns, how to build better community budgets, innovative techniques to help you get the results you're looking for, and gather insight into what factors are really driving this 'new economy'. Join MAP on Mackinac Island this October to celebrate National Community Planning Month. Registration and program details at: [www.planningmi.org/conference.asp](http://www.planningmi.org/conference.asp)

CBA's the best answer to large-scale infrastructure projects or commercial development, such as big box stores, or entertainment facilities?

The second article lays out a few approaches to get CBA's integrated into current development processes. What tools are available? What benefits could a comprehensive CBA ordinance offer, where all development of a certain size and scope is subject to its provisions? Or is a gradual approach better? Or could CBAs be tied to zoning, where

*Continued on page 3*

## PLANNER INSIDE

COMMUNITY BENEFITS AGREEMENTS (CBA'S) .....	1-3
CONNECT .....	2
COMMUNITY BENEFITS TOOLS .....	3-9
CSA CASE STUDIES .....	10-13
OFFICIALLY YOURS .....	14

## BOARD OF DIRECTORS E-LECTION UPDATE: HOW TO VOTE!

We're just days away from the 2014 MAP Board of Directors E-election, and with candidate names and position statements posted ([www.planningmi.org/board.asp](http://www.planningmi.org/board.asp)), polls are set to open September 19th through October 1st.

The annual election for the Michigan Chapter of the American Planning Association's (MAP) Board of Directors is conducted each fall, prior to the annual conference. Voting will be hosted by [www.votingplace.net/map](http://www.votingplace.net/map). Your member ID# will be needed for electronic voting. You can find it in the address line (on the back cover) of this issue of your magazine. APA members: please note that if your member ID# begins with 0, 00, or 000, you should not enter the zeros when entering your number.

All members who have provided an email address and receive the *Michigan Planner E-dition* newsletter, and *Education Updates* from MAP will also receive an email notifying you when the polls open. This email will contain a link to the voting site, specific directions, and your individual member ID#. If you do not receive these emails, we need your email address! Call 734-913-2000, or email [info@planningmi.org](mailto:info@planningmi.org) to update your membership info.

## MAP SEEKS NEW PROFESSIONAL DEVELOPMENT OFFICER (PDO)

The PDO is a non-voting board position appointed by the president with the approval of the board to serve a three year term; the position is held to the same board membership rules as any regular director for attendance, participation, meeting preparation, attendance at MI Chapter events, and serving as an ambassador for the association.

Candidate requirements include achievement of AICP certification and individuals must be in good standing with APA and AICP. See the complete PDO description at [www.planningmi.org/board.asp](http://www.planningmi.org/board.asp).

Interested members should provide a short (up to one typed page) position paper on why they desire appointment and what new initiatives they would bring to the office. Please submit a position statement to Andrea Brown at [abrown@planningmi.org](mailto:abrown@planningmi.org) by September 12, 2014 at 5:00 p.m. to be considered.

## MICHIGAN COMMUNITY AND REGIONAL FOOD SYSTEMS PLANNING POLICY

In 2011 MAP formed an ad hoc committee of food planning leaders and tasked them with researching and writing a Food Systems Planning policy to add to our policy book. Various iterations of the draft policy were considered by MAP's Government Relations Committee and Board of Directors, MAP members and other food planning experts, and we received many excellent suggestions for modification.

Several years in the making, this policy covers emerging and critical food policy issues that will guide the direction and products of MAP in food systems planning for years to come. The final iteration of the *Michigan Community and Regional Food Systems Planning Policy* was adopted by the MAP Board of Directors on June 2nd, 2014, and is available for reference at [www.planningmi.org](http://www.planningmi.org).

We'd also like to recognize and sincerely thank the food systems planning team who researched, wrote, and rewrote this timely and important policy: Kathryn Colasanti, Megan Masson-Minock, Kami Pothukuchi, Deirdra Stockman, and Kathryn Underwood... THANK YOU!!

## MAP BOARD MEMBERS

Paul Montagno, AICP  
President

Washtenaw County Office of Community  
& Economic Development  
[montagno@ewashtenaw.org](mailto:montagno@ewashtenaw.org)

Sharlan Douglas, APR  
Vice President

Douglas Communications Group LLC  
City of Royal Oak Planning Commission  
[sdouglas@douglasgroup.biz](mailto:sdouglas@douglasgroup.biz)

Steve Schnell, AICP  
Secretary/Treasurer

Cheboygan County  
[steve@cheboygancounty.net](mailto:steve@cheboygancounty.net)

Mary H. Campbell, ASLA, AICP  
M.C Planning & Design  
[mcampbell@mcplanningdesign.com](mailto:mcampbell@mcplanningdesign.com)

Eric Dueweke  
University of Michigan  
[ericdue@umich.edu](mailto:ericdue@umich.edu)

David Esparza, AIA, LEED ND  
City of Detroit Board of Zoning Appeals  
[davidesparza1@gmail.com](mailto:davidesparza1@gmail.com)

Jeff Hagan  
Eastern U.P. Regional Planning &  
Development Commission  
[jshagan@eup-planning.org](mailto:jshagan@eup-planning.org)

Rex LaMore, Ph.D.  
Michigan State University  
[lamore@msu.edu](mailto:lamore@msu.edu)

Jim Schafer, AICP  
Professional Development Officer  
City of Madison Heights  
[jimschafer@madison-heights.org](mailto:jimschafer@madison-heights.org)

Nathan Hetu  
Student Representative  
Eastern Michigan University  
[netu@emich.edu](mailto:netu@emich.edu)

Mark Miller, AICP,  
Immediate Past President  
City of Troy  
[millermf@troymi.gov](mailto:millermf@troymi.gov)

## MAP STAFF

Andrea Brown, AICP, Executive Director  
[abrown@planningmi.org](mailto:abrown@planningmi.org)

Lauren Carlson, Director of Information  
and Planning  
[lcarslon@planningmi.org](mailto:lcarslon@planningmi.org)

Sherrie Howard, Director of Operations  
[showard@planningmi.org](mailto:showard@planningmi.org)

Amy Miller Jordan, Director of Education  
[ajordan@planningmi.org](mailto:ajordan@planningmi.org)

Meghan Prindle, Associate Director  
of Education and Programs  
[mprindle@planningmi.org](mailto:mprindle@planningmi.org)

*Community Benefits Agreements | Continued from page 1*

rezoning requests create community engagement requirements, and the community is an equal stakeholder in the project's outcome?

The third article highlights one of the most common CBA provisions, jobs and workforce development. As a core component in many CBAs, the question of how to increase local hires and training during and after construction is paramount, especially in economically depressed communities. How can CBAs help give local communities an economic lift? Can they shift how economic development policy occurs to benefit a greater number of people? And finally, how can CBAs create a "jobs pipeline" for well paying jobs throughout the life of the proposed project?

And the final articles look into community transforming 'super' developments - Detroit Arena District in the Lower Cass Corridor and the New International Trade Crossing in the Delray neighborhood of Southwest Detroit - and how these neighborhoods are being impacted even before construction begins.

## WHAT ARE COMMUNITY BENEFITS AGREEMENTS?

It is important to understand that there's a difference between ways to encourage development processes that result in more or better community benefits, and CBA's per se, which are themselves binding legal contracts. Usually a CBA is negotiated between a host community and a developer, often with a local unit of government serving as an additional signatory to the contract.

The contract allows monitoring and accountability, and potentially legal recourse, for the negotiated benefit(s), whether they concern a percentage of local hires, provision

of a public space, or integrating green building practices. Especially in cases where the proposed development is introduced in a way where it negatively impacts a community environmentally or socially, the dynamic can become hostile. CBA's are one way community concerns can be mitigated and (ideally) both parties can work to mutually beneficial ends, and eventually a community can support the project.

The community benefits movement began over a decade ago in cities across the country in response to increasing numbers of heavily subsidized projects that were underwritten by taxpayer dollars, but offer little positive benefit for its host community and minimal community engagement. Most notably these campaigns were focused on large projects, such as arenas in places like Los Angeles and Pittsburgh, where communities formed issue-based coalitions to push for CBA's that resulted in community benefits like living wage jobs, affordable housing, resident parking and local business development opportunities.

Since they are a negotiated contract agreement between a community and developer, the range of what can be included in a CBA is very broad.

*CBA's are one way community concerns can be mitigated and (ideally) both parties can work to mutually beneficial ends, and eventually a community can support the project.*

CBA's very often concern themselves with attaining wage requirements, local hiring goals, and securing job training programs. However, CBA's can also encourage local business participation, restrictions on big box footprints, community centers and access, parks and open space, historic preservation, affordable housing, traffic and parking mitigations, and other environmental issues. Each project has different considerations, and each community's response is different.

While each CBA may be different, at their most basic level, CBA's seek to elevate three core concepts. The first is to maximize inclusiveness in the process to allow many aspects of the community to be represented. The second is to outline a scope of enforceability for the developer and project. And the third is to hold government accountable, so that people have a voice about how public dollars are spent on development projects in their communities.

## COMMUNITY BENEFITS TOOLS

### *For Achieving Equitable and Inclusive Development*

WHEN LARGE (AND SOMETIMES CONTROVERSIAL) new development projects are proposed, elected officials and residents alike must carefully weigh the anticipated impacts and benefits for the host community. This is especially true when most local economic development strategies rely on a range of public subsidies (e.g. tax abatements and transfers of publicly held land for less than market value) to attract new projects. In exchange for the investment of public resources, developers will offer many promises about the benefit of their project to the local community, such as citing the number of jobs created and tax revenue expected. However, following project approval, this approach does not give local officials or residents the ability to ensure that promises are followed

through on and that the its overall impact serves to improve rather than diminish quality of life in the host neighborhood.

Local communities are exploring how to leverage the considerable investment of public funds into development projects to encourage inclusive local economies and expand resources for residents in underserved neighborhoods. A community benefits program consists of a set of effective tools and policies that produce "win-win" outcomes for all stakeholders through equitable partnerships with host communities and accountable development standards for creating good jobs and improving the quality of life in impacted neighborhoods.

A guiding principle of community benefits work focuses on meaningful engagement and partnership between

the developers, local government, and residents throughout the planning, engagement, and implementation process. This ensures that the project addresses the self-identified concerns and needs of the community and residents have a meaningful and voice in the success of the

The following brief highlights some of the community benefits tools available to equitable development groups identified by host communities, governments and residents can use these policies and program or in combination to help the maximum return for investment in economic development projects. More details are available from The Partnership for Working Families ([www.forworking.org](http://www.forworking.org)), a national organization that assists local community benefits organizing efforts across the country by researching and advocating for policies that support this work.<sup>1</sup>

### COMMUNITY BENEFITS POLICIES

**Community Benefits Standards:** City officials have a number of tools and policy options available to support the inclusion of robust community benefits with development deals. A city may adopt living wage ordinances, local-hiring standards, mixed-income housing requirements, and other policies that apply to all projects and support the goals of community benefits efforts.

**Community Impact Reports:** Local governments may take steps to improve the planning process for large publicly subsidized projects by requiring developers to produce community impact reports that give stakeholders timely information concerning the economic and social benefits and impacts of the proposed project prior to approval.

This can inform the priorities for community coalitions as they enter into negotiations for a CBA.<sup>2</sup>

### Multi-Parcel Development Standards: Creating standards



**Ordinances requiring Community Benefits Agreements:** Cities seeking to create a baseline community benefits standard for every development project seeking public subsidy may explore adopting legislation that requires Community Benefits Agreements as a condition for those deals. Currently the Detroit City Council is considering such an ordinance.

For years, nearly every new development in the city has relied on some form of public investment, whether large or small, to move the project forward. Yet, many of the projects receiving the largest amount of help have not produced the results promised in terms of jobs for Detroiters, improved economic conditions, or a better quality of life in the host neighborhood.

In the wake of the recent Red Wings Hockey arena deal completed without a firm commitment to community benefits and with many large projects in various stages of development (including the new bridge to Canada,

## SAVE THE DATE!

### EMERGING PLANNING PROFESSIONALS (EPP) CAREER RESOURCE FAIR

NOVEMBER 5, 2014 | ANN ARBOR

This informal networking and career resource fair is the opportune time to build your network and prepare for the jump into the Michigan land use community. For the emerging professional and student looking to make connections, and for the seasoned (and employed) individual willing to reach out and provide expertise, advice, and guidance, this is your chance to intentionally connect.

Volunteer to sponsor, mentor, or join the event planning committee for this new initiative by emailing Lauren Carlson, [lcarslson@planningmi.org](mailto:lcarslson@planningmi.org).

For more information regarding the EPP Career Resource Fair on November 5th, link to [www.planningmi.org/epp.asp](http://www.planningmi.org/epp.asp)



redevelopment of the Michigan State Fairgrounds, and M-1 streetcar), Equitable Detroit, a citywide community coalition, has organized and worked with City Council to create a draft "Community Benefits" ordinance.<sup>4</sup>

The Detroit Community Benefits ordinance does not address specific requirements for an individual project, but sets the conditions for when a developer must work with community members and negotiate a Community Benefits Agreement (CBA). It also identifies the general topics that should be covered in a CBA (e.g. housing, local hiring, environment), provisions for monitoring the agreement terms, and guidelines for identifying the impacted community for a project and negotiating with a representative community coalition. While several cities have adopted various policies (already listed) to advance and support community benefits programs, the Detroit ordinance may be the first local legislation to comprehensively require CBA's that are negotiated between community representatives and the developer.

### COMMUNITY BENEFITS AGREEMENTS (CBA'S)

CBA's are the best-known tool for supporting community benefits. Such agreements are project specific and negotiated between a developer and a community coalition as legally binding contracts that specify the project's contributions to the community. CBA's often include built in monitoring mechanisms to ensure that expectations of the host community and performance goals for the developer are met. Common provisions may include first-source (i.e., local) hiring and job training programs, development of affordable housing, environmental preservation

and remediation, and funding for community services and programs.<sup>5</sup>

CBA's are negotiated directly between the community and a developer, with the local government able to play a supportive role. Authentic and comprehensive public input is critical to determining community priorities for the proposed project. For this reason the community coalition must be broad and represent a cross-section of residents and stakeholders in the affected neighborhood. The negotiation process allows for more proactive and collaborative community engagement and can address a wider range of concerns than is possible in traditional land-use and economic development decision-making by local governments. Depending on state law, the terms of a CBA can be enforced by inclusion in a development agreement between the local government and the developer.



Since the 1990's, dozens of CBA's have been successfully negotiated across the country in cities experiencing a wide range of market conditions and development pressures. Notable examples include the Staples Center CBA in Los Angeles, One Hill District CBA for the new Pittsburgh Penguins Arena, and the Gates Cherokee CBA for brownfield and transit-oriented development in Denver.<sup>6</sup>

A binding CBA provides more

certainty in outcomes for both the developer and community stakeholders. For a variety of reasons, negotiations between a community coalition and developer do not always result in a binding agreement, but can still lead to important improvements in the project that benefit underserved residents. This was true in the Equitable Detroit Coalition's engagement with the new Whole Foods in Midtown Detroit that led to a greater commitment by the company to local hiring and the stocking of locally produced products.<sup>7</sup>

### THE LAND USE APPROVAL PROCESS AND NEGOTIATING FOR COMMUNITY BENEFITS

Through the zoning code and land use regulations, city planners and review boards have long had a set of tools to address anticipated impacts of development projects on city services and the overall community. Examples include conditional re-zonings, development agreements, negotiated exactions, and impact fees. However, the "essential nexus" and proportionality requirements established in the "Nollan" and "Dolan" court cases narrowly define the appropriate use of these tools.<sup>8</sup> These legal constraints may make the land-use approval process a less effective pathway for achieving community priorities that do not fit within these restrictions.

Additionally, the public input process for land use decisions largely consists of public hearings and comments during planning commission meetings. This format does not lend itself well to the intensive negotiating process between community representatives and developers required to achieve an agreement that satisfies the concerns and priorities of residents. By the



time a project reaches the land-use approval process, many of the details that could be points of negotiation for community benefits may already be finalized.

In contrast, the economic development process, during which public subsidies are considered for a development project, and what can be negotiated is not limited by the same rules governing the land use approval process, is more effective.<sup>9</sup> Additionally, a developer can hope to win early community support for a project by engaging in a community benefits process from the start. A local policy that favors or conditions the approval of economic incentives on a negotiated CBA will encourage developers to work with the impacted neighborhood to ensure that the project supports equitable development that is responsive and accountable to community needs and

priorities.

<sup>1</sup> <http://www.forworkingfamilies.org/resources/policy-tools-community-benefits-agreements-and-policies>

<sup>2</sup> <http://www.forworkingfamilies.org/resources/policy-tools-community-impact-reports>

<sup>3</sup> <http://www.forworkingfamilies.org/page/policy-tools-community-benefits-agreements-and-policies-effect#multiparcel>

<sup>4</sup> Draft Detroit Community Benefits ordinance text is available here: [http://www.unitingdetroiters.org/download/CBA\\_draft\\_May\\_16.pdf](http://www.unitingdetroiters.org/download/CBA_draft_May_16.pdf)

<sup>5</sup> Patricia E. Salkin and Amy Lavine, "Negotiating for Social Justice and the Promise of Community Benefits Agreements: Case Studies of Current and Developing Agreements", *Journal of Affordable Housing* 17(2008), <http://ssrn.com/abstract=1117681>.

<sup>6</sup> <http://www.forworkingfamilies.org/page/policy-tools-community-benefits-agreements-and-policies-effect>

<sup>7</sup> [http://www.salon.com/2013/08/29/how\\_is\\_whole\\_foods\\_thriving\\_in\\_detroit/](http://www.salon.com/2013/08/29/how_is_whole_foods_thriving_in_detroit/)

<sup>8</sup> Vick Been, "Community Benefits Agreements: A New Local Government Tools or Another Variation on the Exactions Theme?", Working Paper for Furman Center for Real Estate & Urban Policy - New York University (2010), [http://furmancenter.org/files/publications/Community\\_Benefits\\_Agreements\\_Working\\_Paper.pdf](http://furmancenter.org/files/publications/Community_Benefits_Agreements_Working_Paper.pdf).

<sup>9</sup> Ibid.

**AUTHOR AARON GOODMAN** works for Community Development Advocates of Detroit (CDAD), a citywide membership organization of over 80 community development groups, blocks clubs, and neighborhood improvement associations. In his role, Aaron works to strengthen the network of place-based community organizations and connect them to information and resources concerning planning, development, and policy matters that impact the vitality of Detroit's neighborhoods. Aaron earned his Masters of Urban Planning from the University of Michigan in 2012 and his experiences prior to joining CDAD include coordinating the Michigan Environmental Justice Coalition, managing the Eastside Farmers Market in Detroit, analyzing community input for the Detroit Future City framework, and serving as a Peace Corps volunteer in Mauritania and Senegal (West Africa). Aaron is also a member of MAP's Social Equity Committee.



COMMUNITY  
DEVELOPMENT  
ADVOCATES OF  
DETROIT

## COMMUNITY BENEFITS AGREEMENTS:

### *The Way to Good Jobs*

BEGINNING IN THE 1990s, cities across the country implemented public/private economic development strategies that included major investments in sports stadiums, entertainment arenas, hotels, office parks and upscale residential projects among others. These projects included new construction as well as major renovation and repurposing of older facilities. By the late 1990's, states, counties and cities were spending close to \$50 billion per year on these projects seen as a major stimulus for economic growth. At the local level, cities eager to expand their tax base and bring in dollars often saw their role as one of facilitating what the private developer proposed with little meaningful information about the costs and benefits of the projects.<sup>1</sup>

The community benefits movement is a response to the mixed results experienced by communities that hosted major, heavily taxpayer-subsidized projects – investment that may bring in needed construction jobs in the short term and tax revenues in the long-term but often displaced low-income residents, created low-wage post-construction jobs and raised community concerns about environmental mitigation, green space, public safety, traffic/transportation, and affordable housing. An important tool of this movement is Community Benefits Agreements (CBA's) which are legally-binding contracts negotiated between community groups and a developer. Project benefits, which match local needs, thus become part

*Agreements usually  
include hiring provisions  
that give local residents  
the first chance to qualify  
for new jobs.*

of the development project.<sup>2</sup>

Jobs and job training opportunities are central components of most CBA's. Agreements usually include hiring provisions that give local residents the first chance to qualify for new jobs. CBA's focus on job quality and may include requirements that jobs pay a certain wage along with comprehensive worker benefits. CBA's may also set aside funds to create or enhance training and job-readiness programs to prepare local residents for the new jobs in advance of the project's completion in partnership with community workforce development

and organized labor apprenticeship programs.

The CBA that is often lifted up as the model to follow was signed in 2004 and implemented in 2006 when the Los Angeles airport (LAX) underwent a major modernization. The agreement covered a wide range of jobs at the airport, including retail and food service vendors, airline employees, service contractors, baggage handlers and other jobs on the tarmac. Local hiring requirements are incorporated into all new lease and contract agreements and will be applied to renewals as existing agreements expire.<sup>3</sup> CBA's are negotiated for single projects. Although these remain a strong tool for communities, implementing local job policies that are supported by CBA's for development projects is an emerging trend throughout the country.

For example, in 1996, East Palo Alto California first established local hiring requirements for a major development project. Since then, these requirements were codified in a city ordinance that covers all redevelopment receiving more than \$50,000 in city subsidy. The ordinance applies both to construction and permanent jobs. In 2010, 34% of all retail jobs, on average in redevelopment areas, went to East Palo Alto residents through the city's "First Source Hire Policy."<sup>4</sup> This type of legislation makes it that much easier to negotiate the jobs component of a CBA as the framework is already in place and can be adjusted to meet the specifics of each project and host community.

### THE ROAD TO QUALITY JOBS

Developers often tout that a major benefit of their project will be the jobs generated during site preparation and construction. Although a



*The Access for All apprenticeship readiness program is designed to recruit, screen, assess, select and train City of Detroit residents to compete successfully for entry into registered apprenticeship training programs in six building and construction trades: Laborers, operating engineers, iron workers, cement masons, carpenters, and electricians.*

major slump in development has been experienced over the past few years due to the slow economy, the construction industry is rebounding and with this comes opportunities for new policies and construction careers that can lead to better access to jobs for community residents, increased training opportunities and a career path beyond individual projects.

*Developers often tout that a major benefit of their project will be the jobs generated during site preparation and construction.*

Michigan is still trailing behind the rest of the nation but we are seeing major investment being proposed throughout the state. For example, 8.4 million square feet of office space and 8.5 million square feet of industrial space is under consideration for construction in southeastern Michigan's Livingston, Macomb, Oakland, Washtenaw and Wayne counties.<sup>5</sup> In Detroit, there is a new events arena, M1 rail, expansion of hospitals and universities along

with new housing developments representing millions of dollars of investment. What follows is a brief narrative outlining examples of best practices and policies with measurable outcomes that can have direct application for Michigan localities.

### CONSTRUCTION CAREERS CAMPAIGN

The Partnership for Working Families' (PWF) Construction Careers campaign is working in 15 cities to redesign job quality and job access in the construction industry. Innovative policies are resulting in new recruitment and training standards that lead to life-time careers with living wages and benefits. These programs are not just helping workers – they are creating a highly skilled workforce that benefits contractors. There are many high-quality training programs throughout Michigan but what supports the training models elsewhere are local policies that drive the standards needed to ensure residents are trained and have access to employment. It is one thing to outline in a CBA what community expectations are regarding jobs and

job training; it is another to be sure that those outcomes are feasible and can be met.

**Three examples of PWF affiliates' job policy successes include:**

- Los Angeles Alliance for a New Economy's (LAANE) Metro Transportation Authority Construction Careers Policy (currently the largest in the country) with a value of \$6.2 billion will create more than 23,000 good middle-class jobs in Los Angeles County.
- The State of Massachusetts \$1.4 billion energy efficient plan (the first in the nation) includes equity and job quality standards developed by Community Labor United (CLU) and the Green Justice Coalition.
- Milwaukee's MORE Ordinance increased targeted hiring requirements on public infrastructure projects to 40%. The requirement was expanded to publicly subsidized, privately-built redevelopment projects.<sup>6</sup>

### COMMUNITY WORKFORCE AGREEMENTS (CWA'S)

There are other mechanisms that ensure policies such as those noted above can translate into real jobs for residents of communities hosting major public/private projects. One such successful measure is Community Workforce Agreements (CWAs) that act as conduits to bring disenfranchised workers into construction careers. The process of negotiating a CWA brings building trade unions and trades councils together with the project developer/owner, the general contractor and community organizations to jointly develop the terms of the project.

A targeted hiring program also helps build a labor-community partnership that extends beyond a CWA signed for a specific project. Community groups can assist in screening workers from targeted populations and selected workforce development experts can help to prepare individuals for successful apprenticeships. For example, Access for All, a pilot project underway in Detroit, links community workforce development agencies with the building trades in a construction industry-driven apprenticeship readiness program that will ensure low-income residents are truly prepared to enter the building trades.

Most CWAs utilize standard language and requirements to address community and labor needs leading to training and job opportunities. Such clauses include:<sup>7</sup>

- **Targeted Hiring:** Defines specific populations (e.g., women, veterans, residents of a particular zip code, returning citizens and long-term unemployed) that should be employed for a specific percentage of workforce/labor hours, includes targets for minority-, female- and veteran-owned businesses. Also includes

**MAP reignited the Memorial Scholarship Golf Outing in June for the first time in four years and raised \$3,500 for planning educations through scholarships.**

### *Thank you to our sponsors!*

#### Beverage Cart Sponsor

McKenna Associates

#### Lunch Sponsor

Atwell

#### Breakfast Sponsor

Meijer

#### Hole-In-One Sponsor

Wade Trim

#### Donation

Nathan Etu

#### Hole Sponsors

Beckett & Raeder, Inc.

Carlisle|Wortman Associates, Inc.

Dollar Bill Copying

In Loving Memory of Carol

Steininger-Banas, AICP

LSL Planning, A SAFEbuilt Company

The Mannik & Smith Group, Inc.

Mel Media Group

Secrest Wardle

Toll Brothers, Inc. (2 holes)

a percentage of work hours for apprentices in the first six months of training to ensure on-the-job training.

- **First Source:** Graduates of identified community-based workforce development programs would have priority over other applicants.
- **Employer Training:** Training and technical assistance is provided for contractors that may have little experience in bidding on large-scale projects. This expands the participation rates of small businesses and minority-, female- and veteran-owned companies.
- **Forecasting:** A supply-demand mismatch can occur when community workforce training programs lack information about specific trades for which contractors seek workers. A CWA can help bridge this gap by building collaborative relationships between training programs and organized labor.
- **Enforcement/Monitoring:** CWA clauses can define the makeup and roles of oversight committees responsible for ensuring that contractors abide by the terms of the agreement. Real accountability and applied metrics to measure, monitor, evaluate and enforce agreed-upon employment goals create a system for determining good faith efforts that can be documented and defended by all parties.

The following list highlights a few of the large-scale public and private projects with signed CWA's, including reported outcomes:

Nationals Stadium, Washington, DC. \$534.98 million, 41,000 seat events arena.<sup>8</sup>

- 70% of all apprentice hours were worked by DC residents
- 85% of new apprentices were DC residents
- 51% of new hires were DC residents
- The stadium was completed in less than the time required, was within the budgeted amount, secured a Green Building certification and achieved substantial goals in the development of a DC skilled workforce for the future.

Los Angeles Unified School District (LAUSD) Project Stabilization Agreement, \$20 billion project including construction of new schools as well as repairs, additions, and modernization to existing schools.<sup>9</sup>

- 38% of the workers were local residents, working 41% of the hours on the project
- 31% of the workforce were apprentices, with 51% of those being first-year workers
- Average hourly wage was \$29.58 with benefits

New York City's Community Workforce Provisions: The Building and Construction Trades Council of Greater New York (NY-BCTC) has effectively implemented community workforce provisions for over \$6 billion in development projects.<sup>10</sup>

- 88% of all apprentices were New York City residents
- 63% of all apprentices were minorities, 69% were first-year apprentices

- 10% of all apprentices were women, 11% were first-year apprentices

Although CBA's/CWA's may focus primarily on the construction jobs generated by a development project, negotiating for employment opportunities and benefits for non-construction jobs can occur as well. This has been most successful in communities that adopt local living and prevailing wage policies that in turn transform low-wage jobs into good jobs. As noted, the CBA campaign for LAX was able to institutionalize a living wage ordinance covering the entire airport-related hotel industry. In Denver, the Gates-Cherokee CBA was able to ensure that all project-related construction jobs and non-construction jobs such as janitors and parking attendants were covered by the local prevailing wage.

We are seeing a movement across the country where CBA's are being employed to leverage innovative ways to create more equitable economies. Research supports that CBA's address the legitimate needs and interests of urban communities that historically have been excluded from the benefits of economic development. Lessons from successful negotiated agreements show that good, family-supporting jobs can be created before, during and after construction. Michigan has the opportunity to draw from not only CBA language but also the wide array of complementary local policies that can grow jobs. For as we know, when residents of a community have good, steady wages, they pay taxes and invest in their neighborhoods, resulting in a "win-win" for all.

<sup>1</sup> Julian Gross with Greg LeRoy and Madeline Janis-Aparicio, *Community Benefits Agreements: Making Development Projects Accountable*, May 2005. <http://www.goodjobsfirst.org/sites/default/files/docs/pdf/cba2005final.pdf>

<sup>2</sup> Ibid

<sup>3</sup> <http://www.lawa.org/ourlax/ourLAX.aspx?id=8034>

<sup>4</sup> <http://www.ci.east-palo-alto.ca.us/index.aspx?nid=164>

<sup>5</sup> <https://www.cam-online.com/>

<http://www.forworkingfamilies.org/campaigns/construction-careers>

<sup>7</sup> <http://www.jff.org/publications/community-workforce-agreements-pathway-career-opportunities>

<sup>8</sup> [http://www.plaswork.org/Projects/Project-Focus/Washington-Nationals-Stadium-\(1\).aspx](http://www.plaswork.org/Projects/Project-Focus/Washington-Nationals-Stadium-(1).aspx)

<sup>9</sup> <http://www.forworkingfamilies.org/resources/publications/constructing-buildings-building-careers>

<sup>10</sup> [https://www.ilr.cornell.edu/news/upload/PLA-REPORT-10-6-2011\\_FINAL.pdf](https://www.ilr.cornell.edu/news/upload/PLA-REPORT-10-6-2011_FINAL.pdf)

**AUTHOR KRISTINE B. MIRANNE, PHD**, has worked in the community development arena since her first position on Mayor Dutch Morial's planning and economic development staff in New Orleans. She has taught urban law, urban studies, housing and urban/social policy at several universities, most recently at Wayne State University. She is the former director of the Skillman Center for Children at Wayne State and for five years directed a collaborative of organizations in southwest Detroit (Southwest Detroit Development Collaborative). For the past three years, she has worked with Doing Development Differently in (metro) Detroit, currently serving as Director of Research, Analysis and Monitoring.



Doing Development Differently in <sup>Metro</sup>Detroit

## AMERICAN INSTITUTE OF CERTIFIED PLANNERS

AICP is the American Planning Association's professional institute, providing recognized leadership nationwide in the certification of professional planners, ethics, professional development, planning education, and the standards of planning practice.

### AICP CERTIFICATION

Planners with the AICP credential bring extra value to their employers and their communities. To become a certified planner, APA members must meet certain education and experience requirements and pass a written examination. The exam is given twice a year, in May and November.

This past May, six individuals passed the exam in Michigan. We would like to recognize the newest members to achieve professional planner certification...

*Congratulations!*

Scott Barb, AICP • Robert Carson, AICP • Tricia Demarco, AICP  
Robert Gibbs, AICP • Elizabeth Luther, AICP • Amber Miller, AICP

## CBA CASE STUDY: *Detroit's Arena District*

IN A PLACE LIKE DETROIT, there is a growing list of major developments — the new international bridge, Woodward Avenue's M1 light rail project, and a new Red Wings arena, to name just a few—where significant public money is being utilized on projects that will transform the landscape. These projects potentially offer many positive attributes, but they are also in or near communities that have suffered from decades of disinvestment.

More often than not, these communities lack the resources to properly engage or influence the development process to ensure that a project's impact is not only mitigated, but that it is delivered in such a way as to equally justify the public expense.

One such project is the new Red Wings arena, located just north of Detroit's central business and entertainment districts, along Woodward Avenue. For many years, this neighborhood, known as the Lower Cass Corridor, was also known for its social and physical decline. Hallmarked by drugs and prostitution, abandoned and burnt out buildings, and vacant lots, the neighborhood was written off by many. At the same time, the area contains a number of anchor institutions such as the Masonic Temple (the world's biggest), one of Detroit's premiere public high schools, Cass Tech, a number of small businesses and social service agencies, as well as a number of residential buildings, many containing low income residents.

The area was also a target for speculation and the prospect of new investment. After a number of years, Olympia Development, an arm of Ilitch Holdings, announced

*More often than not, these communities lack the resources to properly engage or influence the development process.*

in December 2012 that the neighborhood would be the site of a new events center and hockey arena for the Detroit Red Wings. In addition to the \$450 million events center, the announcement also outlined plans for a surrounding "district" that included an additional \$200 million in mixed-use, residential, and commercial development. In order to finance the deal, Olympia worked directly through the Michigan Legislature to secure over \$250 million in public financing. A unique funding mechanism was developed to expand the boundary of the city's Downtown Development Authority so that taxes in the larger area could be "recaptured" to help underwrite the development.

Throughout the public financing process there was almost no public input. By late 2013, when the project came before Detroit City Council for approvals of the DDA expansion and land transfer agreement, there was sufficient public awareness and organization to help advocate for heightened scrutiny and more community benefit. A volunteer group, Corridors Alliance, which had previously begun to identify "areas of concern" around a prospective arena, held a series of public meetings with the assistance of Doing Development Differently in Detroit (D4), to garner community feedback. By December 2013, the groups had developed a series of "asks" in the form of a letter to then City Council President Saunteel Jenkins leading into the City Council's vote.

The letter, calling for a binding community benefits agreement, outlined nine areas of community concern, and offered specific, measureable asks based on community feedback and input from expert best practice, locally and nationally. These elements included:

- Employment targets for Detroit residents, both during and after construction;
- Affordable housing, to ensure there was no further displacement, as well as targets for new construction;
- Environmental considerations, such as project design and green space, historic preservation and green building standards, wastewater disposal, and minimizing the impact of construction on the neighborhood;
- Traffic and transportation planning during and after construction, including pedestrian, bicycle and public transportation access, and traffic routing and calming features;
- Parking planning to discourage the use of surface lots, garage design standards, resident access, and dedicated bus areas;
- Public safety considerations, including a community engagement strategy, neighborhood policing program, and extended security patrols; and
- Community access to the events center.

Inherent in the letter was a request to empower a locally elected stakeholder group to monitor these issues and work with the city and the developer to ensure that community needs were being met. In a nod to the community's efforts, the City Council elected to hold off on a final vote on the land transfer, until a greater



degree of community input could be established.

During this time, it was discovered that several of the items listed, such as provisions around construction jobs and public safety, were already in the project agreement, or were potentially part of future approvals. After a series of meetings and negotiations between Olympia and incoming council member Raquel Castaneda-Lopez, in whose district the arena would be located, it was agreed that a Community Needs Assessment would be funded, the City Council eventually voted to support the land transfer and elect a "Neighborhood Advisory Council." As the name suggests, this neighborhood council would only have advisory capacity, but would be



officially recognized by the developer and the Detroit City Council to provide feedback with regard to the areas outlined in the original letter.

Since May of 2014, the Neighborhood Advisory Council has been elected, seated and is meeting regularly. As of this writing discussions between the new neighborhood council and Olympia are just getting underway.

**AUTHOR FRANCIS GRUNOW**, *New Solutions Group, LLC*, contributed the introduction and Arena Case Study. Francis worked as a planner for the New York City Department of City Planning for five years before returning home to Detroit to work on a number of non-profit and community development projects in the city. He went to law school to study real estate and environmental law and has since worked as a partner at New Solutions Group, a public policy consulting firm in Midtown, Detroit.

**new solutions group**  
llc

## CBA CASE STUDY: *In The Shadow of the Bridge*

AS THE DOORS OPEN, a woman enters with two young children - one in a stroller, the other in tow. A steady stream of individuals, young and old, follow behind her. They line up in a queue and wait patiently to check in. Slowly the waiting room comes alive with the sounds of chatter. English and Spanish synchronize into a melody reflective of the southwest Detroit community. Another day at CHASS has begun.

The Community Health and Social Services (CHASS) Center has been providing services to the Southwest Detroit community for 44 years, the majority of those years at its current address on West Fort Street. Established in 1970, the organization, which began as a well-baby center, provides comprehensive primary health, dental and behavioral health care, along with targeted programs to address domestic

violence and sexual assault, diabetic self-care programming and maternal child health. In 2013, the organization provided services to a total of 12,803 unduplicated users.

*Such agreements had never been done in Michigan.*

In 1999 the organization began acquiring adjacent properties with the dream of building a new health center. Its building, a 15,000 square foot renovated auto dealership, was over capacity. Its cramped spaces were an impediment to meeting the health care needs of patients, an impediment to health care access for new patients, an impediment to implementing its broader vision of health care that included important wellness/prevention/intervention programs aimed at vulnerable populations, an impediment to building a reimbursement model that insured the financial health

and long term sustainability of the organization, and an impediment to the physical and economic vitality of the neighborhood. In 2004, CHASS' leadership launched a capital campaign to raise the dollars to make the dream a reality. Optimism over the future, however, would be short lived.

In 2008 the Michigan Department of Transportation (MDOT) held public hearings about a new public/private border crossing - the Detroit River International Crossing (renamed the New International Trade Crossing or NITC under Governor Snyder). Under then Governor Jennifer Granholm, MDOT had been scouting locations in Detroit's Delray community for a 160 acres to house a new border crossing plaza. CHASS is located on the northern edge of Delray and at least two of the proposed design alternatives for the crossing eliminated its Southwest Center. The organization's leadership spoke at public hearings and submitted

public comment imploring MDOT not to choose these alternatives recognizing CHASS as an essential health care provider for hundreds of area residents.

"We heard rumblings about a new bridge but the community has heard rumors like that in the past and nothing ever materialized," said CHASS CEO J. Ricardo Guzman. "We thought this would be the same."

That same year CHASS representatives got involved with a newly formed group of Delray Stakeholders titled the Community Benefits Coalition. The Coalition met monthly with MDOT representatives to begin advocating for benefits to mitigate the impacts of a new border crossing on residents of Delray. The group urged MDOT to go beyond the proposed "green sheets" or required mitigations. It lobbied legislators to direct the department to sign a Community Benefits Agreement (CBA) for the project.

Such agreements had never been done in Michigan but had been successful in other large scale projects

including the port in Los Angeles and the expansion of Columbia University in New York. A CBA could, the Coalition contended, work here to enhance lives of residents in the host community without negatively impacting the project.

When the Record of Decision was signed by outgoing President George W. Bush in 2009, CHASS had gotten its wish. It would not be taken by the project. But, as the saying goes, be careful what you wish for. Instead the planned plaza was proposed immediately adjacent to the footprint for CHASS' new facility. The western edge of the CHASS campus would be the local access road into and out of the plaza. The plan also called for vehicular and pedestrian connectors over the freeway to be eliminated to make way for new freeway ramps. One in particular - the Junction Avenue overpass - was especially alarming because it is the main route for CHASS clients who walk to the Center. Closing the Junction Avenue overpass would significantly hinder access to CHASS

by forcing pedestrians to walk an additional half mile to the east or west to be able to cross the freeway.

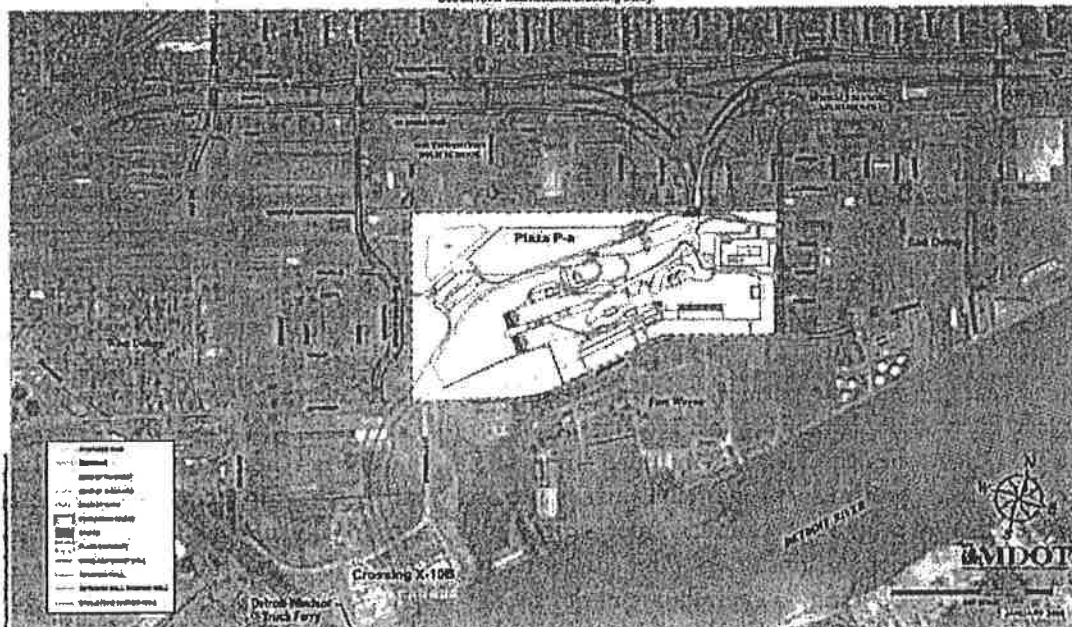
The CHASS leadership had a tough decision to make - move forward with its capital campaign to construct a new center on Fort Street (where all of the necessary 3.14 acres of property had already been acquired), or begin looking for other locations within the community. The Board of Directors chose to move forward with plans on Fort Street, and in 2011 the organization closed on the last of its financing and a year later opened a new 48,000 square foot facility.

"We looked for another location but there were few options to acquire the amount of land needed for our building," said Guzman. "Since we already had the plans and the property we decided to move ahead. In May 2014 we celebrated our second anniversary of being in the new facility. But we continue the fight to keep the Junction Avenue overpass open. We need our clients to be able to get to us, especially those without transportation. And no one will cross in those metal cages for pedestrians.

Not over eight to 10 lanes of traffic. We've had the Lieutenant Governor here, State Representative Tlaib, Senator Carl Levin, the Governor's representatives, the head of MDOT. Now we've been told to talk to Canada."

Sealing the fate of the neighborhood is the Detroit Future City Plan. The city is supporting the NITC effort by designating the area light industrial. Categorizing residential properties as legal non-conforming

Figure 2  
Selected Alternative  
Detroit River International Crossing Study

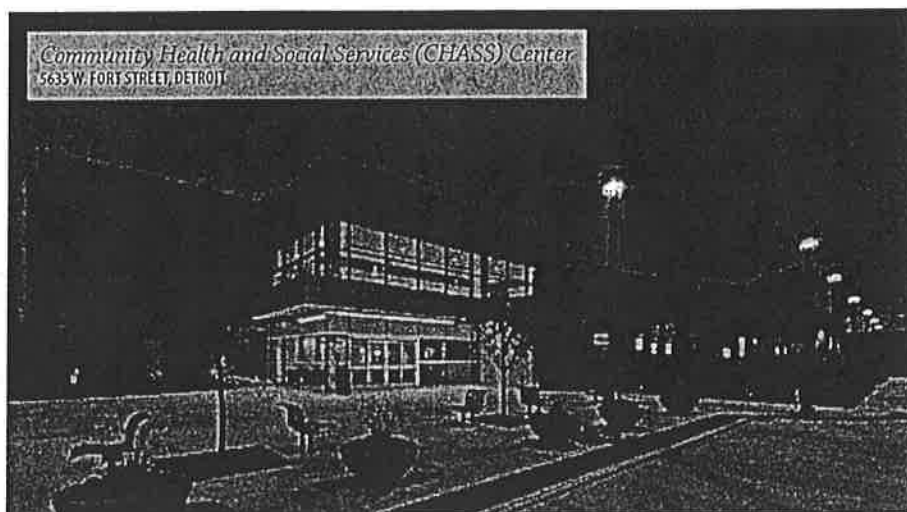


means that residents cannot expand their homes to meet the growing needs of their families.

The community, like CHASS, continues its quest to be made whole by the development. This summer the group will begin a planning process with Community Development Advocates of Detroit and a research project with faculty from the University of Michigan. But the more time that passes the less of Delray there is to save. It's tough to know if the disinvestment began after the announcement of the bridge or before. Or if the bridge announcements and subsequent inaction caused the cancer that spread through Delray pock marking the houses and illuminating the scars of disinvestment.

A community benefits agreement remains off the table, but Governor Snyder has pledged that community benefits will be part of the responsibility of the concessionaire building the crossing. Yet everyone knows that time and money are what matters most in development. The more time, the less money. And there has been no commitment to exceed the required mitigations called out in the record of decision.

Are community benefits agreements the answer to development in every community? No. But they are an important tool when large scale development, like bridges and airports and freeways and stadiums threaten to take large swaths of communities. They are negotiated settlements, that specify the roles and responsibilities of all involved, including communities, and are enforceable in court when not complied with. Is a community benefits agreement the answer for Delray and CHASS? Most assuredly it would resolve the ambiguity around



the development and its impacts and allow the community to move forward developing strategies to thrive in the shadow of the bridge.

**AUTHOR DENISE PIKE** is a practicing planner working for the Community Health and Social Services Center in Detroit. She was the project manager on the financing and development

of the organization's Southwest Center. The building is Silver LEED Certified and has won six awards for design, construction and environmental sustainability. Ms. Pike also served on the board of the Community Benefits Coalition until 2011.



## SAVE THE DATE! TRANSPORTATION BONANZA 6

Creating healthy, mobile and livable communities through innovative planning, design, and the Safe Routes to School program.

National Speaker Paul Morris, FASLA, President/CEO, Atlanta BeltLine, Inc. will discuss strategies to build consensus among stakeholders to integrate land use and transportation to expand mobility options, and will explain when to engage community, and the steps to take to advance a successful project.

DECEMBER 11, 2014 > LANSING CENTER > 8:00 A.M. - 4:30 P.M.

6 AICP Certification Maintenance Credits (pending approval)  
[www.planningmi.org/tb.asp](http://www.planningmi.org/tb.asp)



The **Officially Yours** feature provides local appointed and elected officials with both basic and advanced topics addressing issues unique to the role as a local government representative.

### THE COMMUNITY PLANNING PROCESS

A major task of planning commissions is to develop and periodically to update the master plan. Many planning commissioners, however, join a planning commission that already has a plan, and as a result, never have a chance to develop a master plan from "scratch." Members who serve two or three terms, though, should become involved in a major review and updating of the master plan. Still, a real danger for nearly all planning commissions is that they get caught up in the short-term pressures and concerns and never really step back as a group and make a broad based assessment of what has happened.

#### Why should planning occur?

Planning should take place for a number of reasons, including:

- *State planning acts require local planning commissions to develop a master plan.* This requirement may be important if a dispute arises and develops into court proceedings.
- *Planning permits communities to make choices and set goals rather than just accept what happens.* Planning, thus, contributes to orderly growth and development.
- *Planning helps prevent wasteful expenditure of public and private funds.* Planning enables local governments to anticipate service demands and to plan, locate, and build public service facilities accordingly. Costly mistakes are thus eliminated or at least reduced.
- *Planning is a key way to allocate scarce resources.* Without a public planning process, decisions that determine how land and other community resources are used are largely private decisions. Planning, thus, permits the community at large to have a say in how the community develops.
- *Planning helps to protect property values* largely by controlling the impact of one land use on a different use on adjacent or nearby land.
- *Planning contributes to economic development.* It provides information and data to those considering major investments in a community. It allows prospective investors to access the ability of a community to meet its needs for public services.

This list of reasons for community planning is important for planning commissioners to insist on energetic and consistent community planning. But planning commissioners need not be timid in asserting that investments in planning provide a solid return.

#### What is the planning process?

Planning is a way of achieving specific goals, solving existing problems, and preventing undesirable conditions from developing. A close look at the process reveals eight distinctive phases.

*Identifying problems or issues* - The list of problems, or conditions to be avoided, will be long in communities just beginning the process. In places needing to update the master plan, the list will be much shorter.

*Research and analysis* - This step involves gathering information and data, analysis of which should produce a clearer understanding of the problems.

*Formulating goals and objectives* - In this phase, the group seeks to define or describe the goals and objectives to be sought on behalf of the community.

*Identify and evaluate alternatives* - Here the purpose is to develop and assess several possible plans or programs to achieve the goals agreed upon.

*Selecting a course of action* - The planning commission must next decide upon a series of policies or steps to deal with a specific problem or group of related problems. It may take the form of a policy statement in the master plan or a recommendation to the legislative body for a change in an ordinance.

*Implementing approved plans* - In this phase a planning commission considers proposals for development against its master plan.

*Evaluation* - Here the planning commission evaluates its own actions as well as those of public and private decision makers to assess progress toward goals.

*Adjusting plans and programs* - Mainly this phase involves making minor adjustments unless major problems requiring significant new data needs and analysis are identified.

The planning process, then, is a problem-identifying and problem-solving procedure that enables a group to make interrelated choices. It is a goal-directed way of thinking about the future.

Developing a community's very first master plan can be a major undertaking. But if you are working to update a plan that has proven its value, your effort will likely be more limited, focusing on particular problems such as traffic, survival of industrial plants, periodic flooding, or other conditions defined as problems or situations for which new goals and objectives are sought.

## 2014-2015 MEMBERSHIP RENEWALS

**THANK YOU MAP/APA MI MEMBERS** for recommitting yourselves and your communities to supporting land use education, information, and advocacy through MAP membership.

**MAP'S CORPORATE MEMBERS** have committed to providing additional financial contributions that allow MAP to improve our educational programs and expand the capacity of land use planning resources for everyone. Thank you!

Beckett & Raeder, Inc.

Carlisle Wortman Associates, Inc.

Clean Energy Coalition

Consumers Energy

DTE Energy

Hamilton/Anderson Associates

IHC Holdings Corp.

LSI Planning, A SAFElbuilt Company

Mannik Smith Group

McKenna Associates

Michigan State Housing Development Authority (MSHDA)

OHM Advisors

Poggemeyer Design Group, Inc.

Versa Development, LLC

Wade Trim

**CALLING CARDS**, a directory of firms offering professional services, appears in every Issue of the *Michigan Planner*. Firms listed pay a fee for this service which helps defray the cost of publication. This does not constitute an endorsement of any firm by the Michigan Association of Planning.



### DALTON TOMICH

Michigan's Zoning and Land Use Attorneys  
Contact: Daniel Dalton  
ddalton@daltontomich.com  
www.daltontomich.com



Advancing Communities™

OHM-ADVISORS.COM

ARCHITECTS. ENGINEERS. PLANNERS.

ECONOMIC  
DEVELOPMENT  
STRATEGIES  
URBAN  
DESIGN  
ZONING AND  
STANDARDS  
COMMUNITY  
PLANNING

### Beckett & Raeder

Landscape Architecture  
Planning, Engineering &  
Environmental Services

www.bria2.com

Ann Arbor, MI 734.663.2622 ph Traverse City, MI 231.933.8400 ph Petoskey, MI 231.347.2522 ph

### clean energy coalition

energy assessments • project management  
climate action plans • grant writing  
fleet optimization • revolving loan funds  
PACE programs • training

cec-mi.org

(734) 585-5720

www.manniksmithgroup.com



Contact us today for all  
your planning needs!

1771 N. Dixie Hwy

Monroe, MI 48162

Tel: (734) 289-2200

Contact: Royce Maniko, AICP



### ROWE PROFESSIONAL SERVICES COMPANY

Large Firm Resources. Personal Attention. Since 1962.

Planning • Engineering • Aerial Photography/Mapping  
Landscape Architecture • Surveying

800.837.9131

www.rowepsc.com

Flint, Lapeer, Mt. Pleasant, Grayling, Tri-Cities

Urban Planning  
& Design

Landscape  
Architecture

Community &  
Economic  
Development

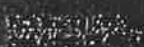
Inspection Services

www.wadetrim.com

### WADE TRIM



ENP & Associates



(734) 332-4051  
(734) 332-5153 fax

www.enp-associates.com

www.enp-associates.com

### LSL Planning

A SAFElbuilt Company

Community & Transportation Planning  
Zoning Ordinances & Administration

Ongoing Planning & Building  
Department Services

Grand Rapids • Royal Oak • LSLPlanning.com

Hotel / Office / Residential / Retail

### Market Studies



Gibbs Planning Group

748.642.4600  
www.gibbsplanning.com



American Planning Association  
Michigan Chapter

*Making Great Communities Happen*

Non-Profit  
U.S. Postage  
**PAID**  
Permit #388  
Detroit, MI

## CALENDAR OF EVENTS AND IMPORTANT DATES

Check the MAP Web site at [www.planningmi.org](http://www.planningmi.org) for event details.

October 8-10, 2014

Planning Michigan  
Grand Hotel  
Mackinac Island

November 5, 2014

Emerging Planning Professionals  
Career Resource Fair  
Ann Arbor

December 17, 2014

Transportation Bonanza 6  
Lansing

February 20, 2015

Student MAP Conference  
University of Michigan

April 9, 2015

Spring Institute  
Lansing Radisson

## CHANGE OF ADDRESS

For APA members send to:  
Member Records Department  
APA  
122 South Michigan Ave., Ste. 1600  
Chicago, IL 60603-6107

For Michigan Chapter only  
members send to:  
MAP  
219 South Main Street, Ste. 300  
Ann Arbor, MI 48104



**Connecting  
Schools and  
Community**

Safe Routes to School  
1.800.434.8842  
[www.saferoutesmichigan.org](http://www.saferoutesmichigan.org)

Birchler Arroyo Associates, Inc. is now

# clearzoning

Planning | Zoning | Transportation

[WWW.CLEARZONING.COM](http://WWW.CLEARZONING.COM)  
1-800-311-2774 or 1-800-434-1175



COMMUNITY PLANNING  
GRANT WRITING  
MARKET PLANS  
RECREATION  
ZONING

[WWW.SPICERGROUPOF.COM](http://WWW.SPICERGROUPOF.COM) (800) 833-0062



**CARLISLE WORTMAN  
associates, inc.**

*Just what  
you need,  
just when  
you need it.*

- Community Planning
- Zoning
- Recreation Plans
- Web-based Public Participation

[cwaplan.com](http://cwaplan.com) | 734.662.2200

## PLANNING & ZONING NEWS

Your source for recent court cases,  
contemporary feature articles, new  
publication reviews, and calendar of events.

Mark Wyckoff, FAICP, Editor  
Contact Cheryl Petchell, Office Manager  
715 N. Cedar Street, Suite 2, Lansing MI 48906-5275  
(517) 886-0555 or Fax (517) 886-0584  
web site: [www.pznews.net](http://www.pznews.net)

# McKenna

ASSOCIATES

Community Planning and Design



# FURMAN CENTER FOR REAL ESTATE & URBAN POLICY

**NEW YORK UNIVERSITY** SCHOOL OF LAW • WAGNER SCHOOL OF PUBLIC SERVICE

40 Washington Square South, Suite 314, New York, NY 10012 • Tel: (212) 998 6713 • Fax: (212) 995 4341 • [furmancenter.org](http://furmancenter.org)

## Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?

**WORKINGPAPER 2010**

Vicki Been

# Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?

Vicki Been<sup>†</sup>

*Community benefits agreements (CBAs) are the latest in a long line of tools neighbors have used to protect their neighborhood from the burdens of development, and to try to secure benefits from the proposed development. This Article canvasses the benefits and drawbacks various stakeholders perceive CBAs to offer or to threaten, and reviews the legal and policy questions CBAs present. It recommends that local governments avoid the use of CBAs in land use approval processes unless the CBAs are negotiated through processes designed to ensure the transparency of the negotiations, the representativeness and accountability of the negotiators, and the legality and enforceability of the CBAs' terms.*

## INTRODUCTION

A community benefits agreement (CBA) results from negotiations between a developer proposing a particular land use and a coalition of community organizations that claims to represent the individuals and groups affected by the proposed development.<sup>1</sup> In a typical CBA, community members agree to support the developer's proposed project, or at least promise not to oppose the project or to invoke procedural devices or legal challenges that might delay or derail the project. In return, the developer agrees to provide to the community such benefits as assurances of local jobs, affordable housing, and environmental improvements.<sup>2</sup>

CBAs are a relatively recent phenomenon across the United States, although they grow out of a long history of negotiations among developers, land use authorities and public officials, and the affected community and various stakeholder groups (such as environmental groups or organized labor) over development proposals that require governmental approval.<sup>3</sup> The first major CBA, the Los Angeles Staples Center agreement, was signed in 2001.<sup>4</sup> Since then, scores of CBAs have been negotiated across the country.<sup>5</sup>

Because most CBAs are relatively new, there is scant evidence (either empirical or anecdotal) to evaluate whether CBAs are a net benefit to the parties who enter into these agreements. Similarly, little is known about the impact CBAs have on individuals or community groups in the neighborhood of the development that are not parties to the

<sup>†</sup> Boxer Family Professor of Law, New York University School of Law.

This Article grew out of my participation in a subcommittee on community benefits agreements of the Committee on Land Use of the Association of the Bar of the City of New York, but does not necessarily reflect the views of that subcommittee. I would like to thank the other members of the subcommittee—Ray Levin, Mark Levine, Ross Moskowitz, Wesley O'Brien, Ethel Sheffer, and Laura Wolff Powers—as well as members of the Committee on Land Use, for the many insights, arguments, and jokes shared while the subcommittee grappled with the intellectual and policy challenges CBAs raise. In addition, I am grateful to participants in the *Reassessing the State and Local Government Toolkit* Symposium sponsored by the John M. Olin Program in Law and Economics at The University of Chicago Law School, and the participants in NYU's Furman Center for Real Estate and Urban Policy brown bag lunch series for many helpful suggestions and critiques. I also would like to thank Matthew Jacobs (NYU 2010), Michael Nadler (NYU 2011), and Caroline Nagy (NYU 2010) for their superb research assistance, and Bethany O'Neill for her tireless administrative support. Finally, I appreciate the financial support provided by the Filomen and Max D'Agostino Research Fund.

<sup>1</sup> Julian Gross, Greg LeRoy, and Madeline Janis-Aparicio, *Community Benefits Agreements: Making Development Projects Accountable* 9 (Good Jobs First and the California Partnership for Working Families, May 2005), online at <http://www.goodjobsfirst.org/pdf/cba2005final.pdf> (visited Nov 9, 2009).

<sup>2</sup> *Id.* at 9–10.

<sup>3</sup> William Ho, *Community Benefits Agreements: An Evolution in Public Benefits Negotiation Process*, 17 J. Affordable Housing & Community Dev. L. 7, 9 (2008); Vicki Been, *Compensated Siting Proposals: Is It Time to Pay Attention?*, 21 Fordham Urban L.J. 787, 794–95 (1994).

<sup>4</sup> See text accompanying notes 11–20.

<sup>5</sup> See generally Harold Meyerson, *No Justice, No Growth: How Los Angeles Is Making Big-Time Developers Create Decent Jobs*, 17 Am. Prospect 39 (Nov. 5, 2006) (noting that CBAs have been negotiated for at least forty-eight development projects).

agreements. Nor is it yet clear what effect CBAs will have on the land use process or on local governments' economic development policies more generally.

Given the rising popularity of CBAs, it is important to evaluate the benefits and drawbacks of these agreements in light of both the experience (albeit limited) of parties who have entered into CBAs and more theoretical concerns about the impact that CBAs may have on the processes of land use regulation and real estate development. Those theoretical concerns are grounded in a long history of efforts by communities, developers, and local governments to find flexible ways to address neighbors' concerns about development proposals. Conditional rezonings, development agreements, negotiated exactions, conditional negative declarations in environmental impact review, and compensated siting agreements between industries needing to develop locally undesirable land uses (LULUs) and host communities have been used for decades.<sup>6</sup> The debates about, and experiences under, such progenitors of CBAs offer important insights into the possible advantages and disadvantages of CBAs.

This Article begins by briefly summarizing the structure, history, and political and legal context of CBAs. Part II evaluates the benefits and drawbacks various stakeholders perceive CBAs to offer or to threaten. Part III surveys some of the thorny legal and policy questions presented by CBAs. Part IV argues that local governments should avoid the use of CBAs in the land use process unless they are subject to various constraints designed to ensure their transparency, representativeness, legality, and enforceability.

## I. OVERVIEW OF COMMUNITY BENEFITS AGREEMENTS

### A. What Are CBAs?

CBAs are agreements that detail the conditions a developer will provide in order to secure the cooperation, or at least forbearance, of community organizations regarding the developer's application for permission to develop a particular project. Community opposition to a proposed development obviously may influence whether regulatory bodies will approve the project. Community opposition also may affect whether government agencies are willing to help fund the project. A developer's ability to secure community acceptance of the project through a CBA accordingly may significantly affect the chances that the project will make it through various regulatory and funding hurdles.

In some cases, the developer initiates discussion about a CBA; in others, community groups approach the developer. At times, regulatory authorities or elected officials have suggested that the parties negotiate a CBA.

The benefits developers offer through a CBA vary with the particular development and community. Common promises include commitments to use local residents or businesses for the labor and material needed for the project; assurances that a certain number or percentage of housing units will be affordable to low- or moderate-income workers; agreements to pay living wages (or other benefits) to workers employed on the project; stipulations that the development be designed and constructed in an environmentally friendly fashion; and promises to correct existing environmental problems.<sup>7</sup> In return, coalitions of community groups promise the cooperation or forbearance necessary to allow the developer to get through the government approval processes as expeditiously as possible.

The final agreement is usually a private agreement between the developer and a coalition of community groups or individual groups. In a few recent cases, though, local government officials have participated in the negotiations<sup>8</sup> or signed the agreement as witnesses,<sup>9</sup> and in

---

<sup>6</sup> See Been, 21 Fordham Urban L.J. at 800–22 (cited in note 3).

<sup>7</sup> Gross, LeRoy, and Janis-Aparicio, *Community Benefits Agreements* at 10–11 (cited in note 1).

<sup>8</sup> See, for example, Matthew Schuerman, *Mr. Bollinger's Battle*, NY Observer 48 (Feb. 19, 2007).

<sup>9</sup> See, for example, Atlantic Yards Development Co., *Community Benefits Agreement* 54 (Brooklyn United for Innovative Local Development, June 27, 2005), online at <http://www.buildbrooklyn.org/pr/cba.pdf> (visited Nov. 9, 2009) (showing Mayor Michael Bloomberg signing as “witness”). See also Julian Gross, *Community Benefits Agreements: Definitions, Values, and Legal Enforceability*, 17 J. Affordable Housing & Community Dev. L. 35, 42 (2008) (noting that the Bronx borough president and three members of the city council signed the New York Yankees CBA).



many cases, the local government has incorporated the agreement (or its terms) into its own development agreement with the property owner.<sup>10</sup>

## B. The Rise and Spread of CBAs

While CBAs have roots in other land use tools, as described in Part I.C, the modern CBA movement began in California. The first CBA involved the \$4.2 billion Los Angeles Sports and Entertainment District development, which abuts the Staples Center, home of the NBA's Los Angeles Lakers.<sup>11</sup> The Staples CBA was negotiated by a consortium of developers that already had constructed the Staples Center itself, and the Figueroa Corridor Coalition for Economic Justice (FCCEJ), a local coalition of twenty-nine community groups and five labor unions.<sup>12</sup>

The development as proposed included an entertainment plaza, a 7,000-seat theater, a 250,000-square-foot expansion of the Los Angeles convention center, retail businesses, a housing complex, and a 45-story hotel, supported by at least \$150 million in public subsidies as well as the use of eminent domain.<sup>13</sup> In an effort to get the project approved before the mayor and several city council members who supported the project reached the end of their limited terms, the developers reached out to the Los Angeles County Federation of Labor, which joined forces with FCCEJ to negotiate the CBA.<sup>14</sup> The city encouraged the negotiations, but did not participate directly.<sup>15</sup>

After just five months of negotiations,<sup>16</sup> FCCEJ agreed to support the rezonings and public subsidies needed for the project, and the developers agreed to:

- fund an assessment of community park and recreation needs, and commit \$1 million toward meeting those needs;
- make “reasonable efforts” to maintain 70 percent of the 5,500 permanent jobs generated by the project as “living wage” jobs;
- adopt a “first source” hiring program, giving preference to certain target groups, including individuals whose home or place of employment was displaced by the development; low-income individuals living within three miles of the development; and low-income individuals from the poorest census tracts throughout the city;
- construct 100 to 160 affordable housing units, representing approximately 20 percent of the total number of units created by the project;
- provide \$650,000 in interest-free loans to nonprofit housing developers for the creation of additional affordable housing;
- provide funding of up to \$25,000 per year for five years toward the cost of implementing a residential permit parking program in the neighborhoods surrounding the development;
- establish an advisory committee to monitor the implementation of the agreement and to enforce its terms.<sup>17</sup>

<sup>10</sup> See, for example, Gross, LeRoy, and Janis-Aparicio, *Community Benefits Agreements* at 29 (cited in note 1).

<sup>11</sup> Negotiations in 1998 regarding the Hollywood and Highland Center (which hosts the annual Academy Awards in its Kodak Theater) also might qualify as a CBA. However, because those negotiations involved a city council member, the agreement may be more appropriately characterized as an exaction. See Patricia E. Salkin, *Understanding Community Benefit Agreements: Opportunities and Traps for Developers, Municipalities and Community Organizations*, in *Land Use Institute: Planning, Regulation, Litigation, Eminent Domain, and Compensation* 1407, 1412 (ALI-ABA 2007). In any event, the Staples agreement is considered by many to be the first CBA. See Patricia E. Salkin and Amy Lavine, *Understanding Community Benefits Agreements: Equitable Development, Social Justice and Other Considerations for Developers, Municipalities and Community Organizations*, 26 UCLA J Envir L & Pol 291, 301 n 26 (2008).

<sup>12</sup> Gross, LeRoy, and Janis-Aparicio, *Community Benefits Agreements* at 14, 114 (cited in note 1).

<sup>13</sup> *Id.*

<sup>14</sup> Ho, 17 J Affordable Housing & Community Dev L at 20–21 (cited in note 3).

<sup>15</sup> *Id.* at 21.

<sup>16</sup> *Id.*

<sup>17</sup> *Community Benefits Program for the Los Angeles Sports and Entertainment District Project A2–A11* (Strategic Actions for a Just Economy, May 29, 2001), online at <http://www.saje.net/atf/cf/%7B493B2790-DD4E-4ED0-8F4E-C78E8F3A7561%7D/communitybenefits.pdf> (visited Nov 9, 2009).



The City of Los Angeles and the Los Angeles Community Redevelopment Agency both approved the CBA, and the agreement was integrated into a development agreement between the developer and the Redevelopment Agency, making it enforceable by both the city and the community groups.<sup>18</sup>

The perceived success of the Staples expansion agreement led to a number of subsequent CBAs in Los Angeles, including the CBA for the Los Angeles International Airport's (LAX) \$11 billion modernization plan.<sup>19</sup> The economic downturn makes it difficult to assess whether CBAs have or will become a permanent fixture in the city's urban development process, but at the very least, they regularly are on the agenda in public discussions about major projects involving public subsidies.<sup>20</sup>

CBAs quickly spread across California.<sup>21</sup> Community groups in Atlanta,<sup>22</sup> Boston,<sup>23</sup> Charleston,<sup>24</sup> Chicago,<sup>25</sup> Denver,<sup>26</sup> Milwaukee,<sup>27</sup> Minneapolis/St. Paul,<sup>28</sup> Miami,<sup>29</sup> New Haven,<sup>30</sup> New Orleans,<sup>31</sup> Seattle,<sup>32</sup> and Washington, DC<sup>33</sup> also have begun to negotiate CBAs.<sup>34</sup> Most are tied to real estate development, and the community groups' ability to insist on a CBA is based on their power to slow down or block required land use approvals. Some CBAs, however, are tied instead to subsidies, franchises, or contracts that the developer wants

<sup>18</sup> Greg LeRoy and Anna Purinton, *Community Benefits Agreements: Ensuring That Urban Redevelopment Benefits Everyone* 8 (Neighborhood Funders Group, Aug. 2005), online at [http://www.nfg.org/publications/community\\_benefits\\_agreements.pdf](http://www.nfg.org/publications/community_benefits_agreements.pdf) (visited Nov 9, 2009).

<sup>19</sup> For a reprint of the SunQuest Industrial Park Community Benefits Agreement, the NoHo Commons Community Benefits Agreement, and the Marlton Square Community Benefits Agreement, see the Partnership for Working Families website, online at <http://www.communitybenefits.org/article.php?list-type&type=155> (visited Nov 9, 2009). See also *Community Benefits Agreement: LAX Master Plan Program* 6-33 (Los Angeles Alliance for a New Economy, 2004), online at <http://communitybenefits.org/downloads/LAX%20Community%20Benefits%20Agreement.pdf> (visited Nov 9, 2009). For discussions of the LAX CBA, see Salkin and Lavine, 26 UCLA J. Envtl. & Pol. at 304-06 (cited in note 11); Salkin, *Understanding Community Benefit Agreements* at 1413-14 (cited in note 11).

<sup>20</sup> Gross, LeRoy, and Janis-Aparicio, *Community Benefits Agreements* at 32 (cited in note 1) (arguing that CBAs are now the "norm for large, subsidized projects in the city").

<sup>21</sup> In San Diego, for example, twenty-seven housing, labor, community, environmental, and religious groups formed ACCORD (A Community Coalition for Responsible Development) and entered into a CBA in 2005 with the developer of the new stadium for the San Diego Padres, PETCO Park. Salkin, *Understanding Community Benefit Agreements* at 1414-15 (cited in note 11). See *Ballpark Village Community Benefits Agreement* 5-19 (Center on Policy Initiatives, Sept. 20, 2005), online at <http://www.onlinecpi.org/downloads/BPV%20CBA%20text.pdf> (visited Nov 9, 2009).

<sup>22</sup> Amy Lavine, *Atlanta Beltline Community Benefits*, Community Benefits Agreements Blog (May 19, 2008), online at <http://communitybenefits.blogspot.com/2008/05/atlanta-beltline-community-benefits.html> (visited Nov 9, 2009).

<sup>23</sup> Gross, LeRoy, and Janis-Aparicio, *Community Benefits Agreements* at 5 (cited in note 1).

<sup>24</sup> Salkin and Lavine, 26 UCLA J. Envtl. & Pol. at 318 (cited in note 11).

<sup>25</sup> A CBA was negotiated in Chicago, contingent on the city being selected as the host for the 2016 Olympic Games. The Chicago negotiations were nullified when Rio de Janeiro was chosen to host the Olympics. See Angela Caputo, *Chicago 2016 Benefits Agreement a "Good Start,"* Progress Illinois Blog (Mar. 27, 2009), online at <http://www.progressillinois.com/2009/3/27/benefits-agreement-good-start> (visited Nov 9, 2009) (explaining that community activists negotiated the CBA, which would have required the development of affordable housing and jobs for the residents living near the planned 2016 Olympic Games host site).

<sup>26</sup> See Ho, 17 J. Affordable Housing & Community Dev. L. at 21-23 (cited in note 3).

<sup>27</sup> See Ann K. Pikus, *Wanted: Affordable Housing in Wisconsin*, 2007 Wis. L. Rev. 201, 217-18. See also Brenda Parker, *This Land Is Our Land: The Battle for a Community Benefits Agreement in Milwaukee* \*1 (unpublished paper, University of Wisconsin-Madison, May 2005), online at <http://www.laborstudies.wayne.edu/power/downloads/Parkeast.pdf> (visited Nov 9, 2009).

<sup>28</sup> See Salkin, *Understanding Community Benefits Agreements* at 1421-22 (cited in note 11) (discussing a CBA related to creating a citywide Wi-Fi network).

<sup>29</sup> Oscar Pedro Musibay, *Miami Commissioners OK Museum Leases at Bicentennial Park*, South Florida Business Journal (Dec. 19, 2008), online at <http://southflorida.bizjournals.com/southflorida/stories/2008/12/22/story11.html> (visited Nov 9, 2009).

<sup>30</sup> Amy Lavine, *Yale-New Haven CBA*, Community Benefits Agreements Blog (Jan. 30, 2008), online at <http://communitybenefits.blogspot.com/2008/01/yale-new-haven-cba.html> (visited Nov 9, 2009).

<sup>31</sup> Jaime Guillet, *Historic Lincoln Beach Needs City OK for New Era*, New Orleans City Business (Jan. 15, 2008), online at <http://www.neworleanscitybusiness.com/viewFeature.cfm?recid=966> (visited Nov 9, 2009).

<sup>32</sup> A CBA was successfully negotiated in Seattle, but the development project was canceled due to deteriorating economic conditions. See Emily Heffter, *\$300M Project at Seattle Goodwill Site Cancelled*, Seattle Times (Apr. 24, 2009), online at [http://seattletimes.nwsource.com/html/localnews/2009116421\\_webgoodwill24.html](http://seattletimes.nwsource.com/html/localnews/2009116421_webgoodwill24.html) (visited Oct 29, 2009); Stuart Eskenazi, *Coalition Talks Reach Deal on Goodwill Site*, Seattle Times B1 (Sept. 2, 2008).

<sup>33</sup> Amy Lavine, *Washington D.C. Shaw District CBA*, Community Benefits Agreements Blog (Jan. 30, 2008), online at <http://communitybenefits.blogspot.com/2008/01/washington-dc-shaw-district-cba.html> (visited Nov 10, 2009).

<sup>34</sup> Salkin and Lavine, 26 UCLA J. Envtl. & Pol. at 318 (cited in note 11); Gross, LeRoy, and Janis-Aparicio, *Community Benefits Agreements* at 5, 85-87 (cited in note 1). The best source of information about CBAs currently in force or being negotiated is the excellent blog maintained by Amy Lavine, a staff attorney at the Government Law Center of Albany Law School. See Amy Lavine, *Community Benefits Agreements Blog*, online at <http://communitybenefits.blogspot.com> (visited Nov 10, 2009).

to win from the government, so the community groups' leverage lies in their influence over those processes.<sup>35</sup>

### C. CBAs in Context: The Role of Negotiated Mitigation and Amenities in Land Use Regulation

The drafters of the first zoning ordinances and the standard state zoning enabling act believed that once enacted, the zoning ordinance would resolve most issues, and exceptions to the zoning would be rare. That has not proved to be the case, for many reasons.<sup>36</sup> Planners and zoners are not omniscient, of course, and cannot write zoning ordinances that anticipate a fast-paced real estate market that must adapt to new technology such as cell phones or new consumer fads such as the coffee bar craze. In addition, buyers want more variety than the cookie-cutter development that rigid zoning tends to produce, and developers want more flexibility to address special characteristics of the land than rigid end-state zoning allows. Regulators (and their constituents) want flexibility to adapt to evolving information about how land development affects wildlife habitat, water quality, air quality, services and infrastructure in neighboring areas, and a range of other interests that are typically considered as part of an environmental review process. Further, land use regulators often see their role as mediating conflicts among the various stakeholders who have legitimate interests in the use of the land, and that role requires flexibility.<sup>37</sup>

Accordingly, zoning has moved from a set of rigid prescriptive rules about land use to a more flexible set of standards, which allow the specifics of the requirements imposed on each proposed development to vary with the threatened impacts of the project and the concerns of the various interest groups affected by the proposal. That flexibility creates dangers, however, that the negotiations surrounding land use development may be unfair to the developer or to those affected by the development, or that the negotiations may stand in the way of a development that would increase the overall social welfare by producing more benefits than costs.

The courts and state legislatures first responded to the advent of "negotiated" zoning with horror.<sup>38</sup> Early decisions struck down "contract" zoning, for example, when the local government conditioned rezonings on so many particulars that the arrangement resembled a contract.<sup>39</sup> But courts eventually realized that negotiation over the details of the land use proposal and its impacts on the surrounding community is an entrenched feature of the land use regulation scheme and shifted from rejecting the practice to instead minimizing the possibility that the negotiations would be unfair. While tolerating negotiations over local improvements that were meant to address burdens the development will impose on the local community, courts draw lines about what are proper "quid pro quo[s]," and have made clear that "government may not place itself in the position of reaping a cash premium because one

---

<sup>35</sup> In Minneapolis, for example, the winner of the bid to develop a citywide wireless Internet service negotiated a CBA with the Digital Inclusion Coalition that commits the developer to contribute to a Digital Inclusion Fund to promote affordable Internet access, low-cost hardware, local content, and training. The Digital Inclusion Coalition, *Recommendations for the Wireless Minneapolis Community Benefits Agreement* 9–15 (June 2006), online at [http://www.digitalaccess.org/pdf/CBA\\_Two-Sided\\_6-27.pdf](http://www.digitalaccess.org/pdf/CBA_Two-Sided_6-27.pdf) (visited Nov 10, 2009).

<sup>36</sup> See Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 Iowa L Rev 1, 3 (2000); Judith Welch Wegner, *Moving toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 NC L Rev 957, 977–78 (1987); Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 Cal L Rev 837, 879 (1983).

<sup>37</sup> Rose, 71 Cal L Rev at 894–900, 908–10 (cited in note 36).

<sup>38</sup> See, for example, *Midtown Properties, Inc v Township of Madison*, 172 A2d 40, 44 (NJ Super Ct 1961) (recognizing that contract zoning allows the "zoning power . . . [to be] prostituted for the special benefit" of the developer), *aff'd*, 189 A2d 226, 227 (NJ Super Ct 1963); *City of Knoxville v Ambrister*, 263 SW2d 528, 530 (Tenn 1953) (asserting that contract zoning destroys "that confidence in the integrity and discretion of public action which is essential to the preservation of civilized society"). For more recent expressions of such concerns, see *Snyder v Board of County Commissioners*, 595 So 2d 65, 73 (Fla App 1991) ("[L]ocal governments frequently use governmental authority to make a rezoning decision as leverage in order to negotiate, impose, coerce and compel concessions and conditions on the developer."); *rev'd*, 627 So 2d 469, 476 (Fla 1993).

<sup>39</sup> Wegner, 65 NC L Rev at 982–86 (cited in note 36); Bruce R. Bailey, Comment, *The Use and Abuse of Contract Zoning*, 12 UCLA L Rev 897, 898–900 (1965).

of its agencies bestows a zoning benefit upon a developer. Zoning benefits are not cash items.”<sup>40</sup>

Perhaps the best example of the courts’ approach is their treatment of exactions and impact fees. Exactions are conditions that a local government imposes on a developer in return for the local government agreeing to allow a land use that it otherwise could prohibit.<sup>41</sup> Exactions are a means of ensuring that developers, rather than taxpayers, bear the costs and risks of development, use publicly funded resources efficiently, and mitigate any harmful consequences of development.<sup>42</sup> Typically, the condition is that the developer supply, or fund, a public facility or amenity. For example, exactions may include impact fees to defray the cost of roads or congestion management needed because of the traffic generated by the development, or may require land or easement dedications for the property needed to provide schools or parks for the development.<sup>43</sup>

Initially, courts were suspicious of local governments’ authority to impose exactions and of the danger that the governments were simply “rent-seeking,” or attempting to extract some of the developer’s profits in exchange for the government’s approval.<sup>44</sup> Eventually, however, the courts’ approach became one of managing the dangers of negotiations over exactions.<sup>45</sup> To ensure that governments were not simply “extorting” developers, the Supreme Court imposed a “nexus” requirement: the benefit the government seeks to exact from a developer must have an “essential nexus” to the legitimate state interest that the government would have invoked to justify rejecting the proposed development.<sup>46</sup> Further, the amount of the benefit the government seeks has to be roughly proportional to the impact that the particular development would impose.<sup>47</sup> Within those strictures (as well as others imposed by state law), however, governments are allowed to impose exactions that seek benefits from developers to offset the impacts the proposed development will have on the local community.

Similarly, the courts have recognized that local governments can impose conditions upon developers through the environmental impact review process. In New York, for example, a negative declaration is a finding by the relevant government entity that a proposed development or project would have no significant effect on the environment and therefore a full environmental impact review is not necessary. Agencies may issue “conditional negative declarations” when they conclude that the developer can adopt measures to mitigate any harmful environmental impacts the proposed development might cause.<sup>48</sup> Indeed, developers try to avoid the need for a complete environmental impact statement (EIS) by offering mitigation measures designed to keep the project’s impacts below the threshold that would trigger full review.<sup>49</sup> Further, agencies confronted with a final EIS that identifies

---

<sup>40</sup> *Municipal Art Society v City of New York*, 522 NYS2d 800, 803–04 (NY S Ct 1987) (voiding the city’s sale of a site to a developer because the developer was promised a \$57 million price reduction if the city did not provide a zoning bonus to allow for increased floor space).

<sup>41</sup> Vicki Been, “Exit” As a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 Colum L Rev 473, 478–83 (1991) (providing an overview of exactions).

<sup>42</sup> Id.

<sup>43</sup> Id.

<sup>44</sup> See, for example, *Pioneer Trust and Savings Bank v Village of Mount Prospect*, 176 NE2d 799, 803 (Ill 1961) (finding that an ordinance requiring a landowner to dedicate part of his property for the construction of a school in exchange for receiving a permit to construct residential units was “an unreasonable condition” and “purports to take private property for public use without compensation”); *Gulest Associates v Town of Newburgh*, 209 NYS2d 729, 733 (NY S Ct 1960), aff’d, 15 AD2d 815 (NY App 1962) (holding an ordinance requiring that a landowner pay for a park, playground or other recreational space to be built before the town granted permission to build on his property “permits the taking of property without due process of law and must therefore be declared illegal, null and void”).

<sup>45</sup> See Been, 91 Colum L Rev at 475 (cited in note 41).

<sup>46</sup> See *Nollan v California Coastal Commission*, 483 US 825, 837 (1987).

<sup>47</sup> *Dolan v City of Tigard*, 512 US 374, 391 (1994) (“[R]ough proportionality” best encapsulates what we hold to be the requirement of the Fifth Amendment . . . the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”).

<sup>48</sup> NY Envir Conserv Law § 8-0109 (McKinney) (setting out the procedure for “preparation of environmental impact statements”).

<sup>49</sup> Consider Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government’s Environmental Performance*, 102 Colum L Rev 903, 908 (2002) (by redefining a project’s impact through backdoor incorporation of mitigation measures).

environmental harm that will result from the development may approve the development conditioned upon various measures to mitigate the harms.<sup>50</sup>

Community benefits agreements must be seen against the backdrop of these doctrines the courts (and legislatures) have adopted to cabin negotiations over the approval of proposed land development. Although the doctrines may not apply directly to CBAs (depending upon how involved land use regulators are in the CBAs, and upon how they are structured), they help to illuminate some of the dangers CBAs pose.<sup>51</sup>

## II. WHAT DO COMMUNITIES, DEVELOPERS, AND LOCAL GOVERNMENTS FIND ATTRACTIVE ABOUT CBAS?

### A. Communities

1. CBAs may give neighborhoods a more meaningful role in the development process than the opportunities the existing land use process provides for public participation.

Those who champion CBAs on behalf of local communities articulate several justifications for the agreements. First, they argue that the local government's normal land use procedures often fail to ensure that the concerns of the neighborhood most affected by the proposed development are considered and adequately addressed.<sup>52</sup> They worry as well that the representatives of the neighborhood are not effective in advocating for the community. In New York City, for example, community boards' recommendations are advisory only and may be ignored by the appointed planning commission or elected officials.<sup>53</sup> Others in the land use approval process could disregard a community board's recommendations for appropriate reasons, such as the City's need for a particular type of development, but also may be perceived as disregarding the community's concerns because they depend upon developers for campaign contributions or other political support.<sup>54</sup> Further, the community boards are given few resources and little training to evaluate development proposals. Members serve at the pleasure of the borough president, who sometimes replaces members whose views he or she does not like. Finally, while New York City gives communities the power to propose their own plans, there is widespread dissatisfaction with that process.<sup>55</sup>

<sup>50</sup> See, for example, *Town of Henrietta v Department of Environmental Conservation*, 430 NYS2d 440, 445–48 (NY App 1980).

<sup>51</sup> CBAs also should be viewed against the doctrines limiting the reach of neighborhood consent provisions in zoning ordinances. Such provisions require developers to secure the consent of some percentage of neighboring property owners before they can develop the property. The requirements have met with considerable skepticism, and the Supreme Court's limited jurisprudence on neighbors' consent provisions suggests that they are unconstitutional if neighbors are able to exercise unbridled discretion, at least if the proposed use is not a noxious one. See *Seattle Title Trust Co v Roberge*, 278 US 116, 120–22 (1928) (determining that an ordinance which allows for the erection of a philanthropic home for children or the elderly only when two-thirds of the nearby property owners consent violates the Fourteenth Amendment); *Eubank v City of Richmond*, 226 US 137, 140–44 (1912) (holding that the Fourteenth Amendment is violated by a measure allowing neighboring property owners to impose building restrictions on adjoining lots). But see *Thomas Cusack Co v City of Chicago*, 242 US 526, 527–31 (1917) (holding that an ordinance allowing the placement of buildings only when written consent is obtained from the neighboring property owners is constitutional and attempting to distinguish this holding from *Eubank*). See also A. Dan Tarlock, *An Economic Analysis of Direct Voter Participation in Zoning Change*, 1 UCLA J Envir L & Pol 31, 37–41 (1980).

<sup>52</sup> Communities in many cities have turned to CBAs out of frustration with the lack of meaningful opportunities for communities to participate in the planning and design of federal urban renewal projects, community economic development programs, and land use decisions more generally. See, for example, Ho, 17 J Affordable Housing & Community Dev L at 11–19 (cited in note 3).

<sup>53</sup> See New York City Charter § 2800(d). See also Community Board Assistance Unit, *Handbook for Community Board Members* 23–48 (NYC Mayor's Office 2009), online at [http://www.nyc.gov/html/cau/downloads/pdf/handbook\\_2009.pdf](http://www.nyc.gov/html/cau/downloads/pdf/handbook_2009.pdf) (visited Nov 10, 2009).

<sup>54</sup> See Gross, LeRoy, and Janis-Aparicio, *Community Benefits Agreements* at 4 (cited in note 1).

<sup>55</sup> See, for example, Frank Lombardi, *Back off Bloomy! Rally at City Hall Rips Community Board Cuts*, NY Daily News 29 (June 10, 2009) (describing how elected officials and community leaders protested the mayor's proposed 11 percent decrease for community board budgets); Helen Rosenthal, *Cutting Back on Democracy*, Gotham Gazette (Mar 16, 2009), online at <http://www.gothamgazette.com/article/fea/20090316/202/2854> (visited Nov 10, 2009) (quoting a community board chairwoman as saying that “community boards have received no meaningful increases in their budgets since 1980 making it impossible for them to . . . keep up with rising costs” and that budget cuts will “diminish the boards’ ability to develop zoning and infrastructure plans, [ ] to analyze and conduct public review of development proposals . . . [and] reduce the boards’ ability to communicate with and involve residents, businesses and institutions”); Lincoln Anderson, *Stringer Wants Reform, New Blood on Community Boards*, The Villager (Feb 22, 2006), online at [http://www.thevillager.com/villager\\_147/stringerwantsreform.html](http://www.thevillager.com/villager_147/stringerwantsreform.html) (visited Nov 10, 2009) (“[P]roblems with community boards have included vacancies left too long unfilled, as well as a highly politicized appointment process and ‘ad-hoc removals’ of board members. . . . Other problems . . . include unreported lobbying and lax

Similar complaints are heard in many cities and towns across the country.<sup>56</sup> Perhaps not surprisingly, then, neighborhoods wishing to have a more significant role in the land use process see CBAs as a more direct and powerful way for residents to shape their neighborhood's development.

2. CBAs give neighborhoods a role in the development process when the local government's typical land use processes are preempted.

Communities complain that they have even less input into the land use approval process when their local government's normal processes are preempted because the project involves the county, state, or federal government or special authorities. In those situations, the processes for approval often do not provide the local community an opportunity to participate that the community finds satisfying.<sup>57</sup> Often, the only hearing open to the public is in the environmental impact review process, and community groups complain bitterly that the hearings are focused on the minutia of dense and technical environmental impact statements and provide little meaningful opportunity for community members to have an impact on the project.<sup>58</sup> CBA advocates accordingly argue that CBAs especially are necessary to ensure that the community's needs are voiced and addressed when a local government's typical land use processes do not apply.<sup>59</sup>

3. CBAs give neighborhoods an opportunity to address issues, such as wage rates or employment practices, that the local government does not typically address in the normal land use process.

Advocates of CBAs believe that CBAs give the residents affected by a development a say regarding all the ways in which a proposal may change the local community, without regard to whether those impacts fit neatly within the current definition of "land use" or environmental "impacts." The normal land use process, advocates claim, focuses on traditional land use concerns, such as the height and bulk of a project, and accordingly does not always ensure that those most affected by the development have a voice in shaping all the ways in which the development could affect or benefit the community.<sup>60</sup> CBAs allow neighborhoods to negotiate their own mitigation and benefits without having to worry about the *Nollan*<sup>61</sup>-*Dolan*<sup>62</sup> nexus and proportionality requirements, which might apply if the city were involved in the negotiations.

Many CBAs, for example, address the percentage of the development's construction jobs that will be reserved for minority, women, or local workers, as well as the wage rates of those hired for the jobs.<sup>63</sup> Such requirements might not pass muster under *Nollan-Dolan*, but advocates believe that because CBAs are private agreements, they will not trigger the *Nollan-Dolan* nexus or proportionality requirements. As discussed in Part III.D, to the extent that CBAs are required by or incorporated into the land use approval processes, they may implicate *Nollan-Dolan*, so this "advantage" of CBAs may be illusory.

---

oversight and enforcement of conflict-of-interest rulings."); Robin Shulman, *Report Finds Disparity in City Aid to Community Boards*, NY Times B2 (June 20, 2005) ("A report on Manhattan community boards found that there is a wide disparity in resources and services across the borough, and that poorer districts sometimes receive far less city money than wealthier ones."); Derek Alger, *Issue of the Week: Community-Based Planning*, Gotham Gazette (Mar 25, 2002), online at <http://www.gothamgazette.com/iotw/communityboards/> (visited Nov 10, 2009) (discussing the problems New York City communities have encountered in trying to develop plans for their own future development).

<sup>56</sup> See Gross, LeRoy, and Janis-Aparicio, *Community Benefits Agreement* at 3-5 (cited in note 1).

<sup>57</sup> New York Public Interest Research Group, *Memo: ULURP Should Apply to the Atlantic Yards Project* (June 18, 2004), online at [http://www.developdontdestroy.org/public/nypirg\\_ULURP.pdf](http://www.developdontdestroy.org/public/nypirg_ULURP.pdf) (visited Nov 10, 2009).

<sup>58</sup> *Urban Renewal: Up in Arms about the Yards*, Economist 33 (Sept 23, 2006).

<sup>59</sup> See, for example, Tom Angotti, *Bronx Terminal Market and the Subverting of the Land Use Review Process*, Gotham Gazette (Dec 2005), online at <http://www.gothamgazette.com/article/landuse/20051213/12/1680> (visited Nov 10, 2009) (discussing the trend for large-scale development projects to be approved outside of the normal land use process).

<sup>60</sup> See Gross, LeRoy, and Janis-Aparicio, *Community Benefits Agreements* at 5-6 (cited in note 1).

<sup>61</sup> See *Nollan v California Coastal Commission*, 483 US 825, 837 (1987).

<sup>62</sup> See *Dolan v City of Tigard*, 512 US 374, 391 (1994).

<sup>63</sup> See text accompanying notes 16-18.

4. CBAs allow neighborhoods to control the distribution of at least some of the benefits of the development.

The normal land use process does not necessarily ensure that those most affected by a development proposal will receive their fair share of the benefits of the development. In many cases, one of the direct benefits of a development is the creation of new jobs. The land use approval process may take into account the permanent benefits that a development will bring to a community in weighing whether to allow the development. But the land use process generally does not address which community, or group within the community, should get jobs (or other benefits) the development creates.<sup>64</sup> Proponents of CBAs believe that they can help give community groups “a united voice”<sup>65</sup> that can help them secure promises that jobs (and other benefits) will be offered first to the residents of the neighborhoods in which the development is being built.

#### B. Developers

1. CBAs may garner community support for the project and therefore increase the chances that the project will be approved.

A developer’s success in obtaining regulatory approvals and financial support from the government in a timely fashion is influenced, of course, by community support for the project. Some developers therefore have accepted and even embraced the use of CBAs because they may secure some measure of community support for, or at least reduce opposition to, the development. Even if the developer believes the project will be approved without a CBA, by gaining support (or reducing opposition) for the project in the community, a CBA may reduce the risk of rejection or save the developer time in the approval process.

2. CBAs may be a more cost-effective way of sharing some of the benefits of the development than other means used in public approvals processes.

Developers also may embrace CBAs because they understand that they will be asked to contribute benefits at some point in the public process and believe that negotiating a CBA with community groups will result in lower costs than negotiating with elected or appointed officials. Or they may believe that promises made through CBAs are less likely to be strictly enforced (in terms of the quality of amenities constructed or offered, for example) than if elected or appointed officials were to require the benefits at issue. Or, developers may believe that they will get greater public relations benefits from CBAs than from any benefits that they provide during a public process.

3. CBAs may provide more certainty that a project will not be challenged in court.

Even after a project has received the requisite regulatory approvals, a developer might still have to consider the likelihood that dissatisfied community groups may sue to challenge the approvals. Developers (and their lenders) are unlikely to expend any significant dollars until the applicable statute of limitations has expired. A CBA will reduce the chances of a lawsuit being filed; the more inclusive the CBA is, the more certainty a developer will have that a project will proceed on a timely basis.

#### C. City Officials and Local Politicians

1. CBAs may allow municipalities to bypass legal constraints on land use regulation imposed by statute and judicial precedent.

As noted above, the Supreme Court’s decisions in *Nollan v California Coastal Commission*<sup>66</sup> and *Dolan v City of Tigard*<sup>67</sup> preclude municipalities from imposing exactions

---

<sup>64</sup> See Gross, LeRoy, and Janis-Aparicio, *Community Benefits Agreements* at 5–6 (cited in note 1).

<sup>65</sup> Ho, 17 J Affordable Housing & Community Dev L at 9 (cited in note 3).

<sup>66</sup> 483 US 825 (1987).

<sup>67</sup> 512 US 374 (1994).

on proposed projects unless those exactions have a substantial nexus to impacts of the developments that would otherwise justify rejection of the development proposal, and unless the exaction is roughly proportional in amount to those impacts.<sup>68</sup> The restrictions established by *Nollan* and *Dolan*, however, only constrain actions taken by the government. Thus, community groups may be able to convince a developer that the agreement is not constrained by *Nollan* or *Dolan* and secure concessions the courts might view as unrelated to the development's land use impacts. To the extent that local government officials are unhappy about their inability to address local concerns because of the strictures of *Nollan* and *Dolan* and other legal constraints, those officials also may wish to see CBAs fill the void. As noted above, however, and discussed more fully in Part III.D, if CBAs are required by or incorporated into the land use approval processes, they in fact may implicate *Nollan* and *Dolan*.<sup>69</sup>

2. CBAs may allow elected and appointed officials to distance themselves from politically unpopular community demands or from politically unpopular developments.

Local government officials may see CBAs as a way to deflect the ire of developers to the community when the developers believe they are being asked to contribute too many, or inappropriate, benefits in exchange for permission to develop. A local government may wish to appear welcoming to development in order to maintain the jurisdiction's growth, and local officials may need to secure developers' campaign contributions to support electoral campaigns, so officials may wish to avoid being seen as overly demanding. By tacitly allowing community groups to bargain with the developer through CBAs that are outside of the land use process, municipalities are able to address community needs while blaming forces outside the land use approval process for the demands made of developers.

CBAs negotiated outside of the land use process also provide cover for local officials who vote to approve a development that is unpopular with their constituents. By citing the CBA, local officials are able to point to the benefits the community will receive and therefore justify the officials' support for the development.

3. CBAs may allow local officials to secure more for their own constituents than the public approval processes might allow.

Politicians who represent the district in which a proposed development falls may believe their constituents should get more of the benefits of the proposed development, because those constituents are likely to bear more of the impacts than others in the community. As discussed in Part II.A.3, CBAs may confer benefits better tailored to the local community's needs than concessions the developer makes in the public approval process because CBAs may not be constrained by the laws applicable to the public processes and because the public approval process involves many other constituencies that must be satisfied.<sup>70</sup> Local politicians accordingly may see the CBA process as a way for them to "deliver" benefits specific to their communities that is easier for them to use than the normal land use processes.<sup>71</sup>

### III. THE LEGAL AND POLICY ISSUES POSED BY CBAS

Many participants in the land use process have expressed concern about the unregulated nature of the CBA negotiations process. Because CBAs are a recent phenomenon, the concerns summarized in this Part are not based on empirical studies of the agreements or their implementation, but instead are based on observations about CBAs currently in operation and on the history of negotiations over land use approvals among city officials, developers, and members of the host community described in Part II.C. This Part draws upon several New York City CBAs to illustrate various points, but examples could be drawn from many jurisdictions around the country.

---

<sup>68</sup> See text accompanying notes 46–47.

<sup>69</sup> See text accompanying notes 46–47, 99–105.

<sup>70</sup> Gross, LeRoy, and Janis-Aparicio, *Community Benefits Agreements* at 10 (cited in note 1).

<sup>71</sup> Salkin and Lavine, 26 *UCLA J. Env't & Pol.* at 292 (cited in note 11).

#### A. Will “Community” Groups Involved in CBAs Represent the Community?

One of the most common criticisms leveled at CBAs is that the agreements may not represent the wishes of the majority of the community. Under New York City’s Uniform Land Use Review Process (ULURP), for example, community boards, borough presidents, the City Planning Commission (CPC), the city council, and the mayor all are involved in the decision whether to grant or deny development approval.<sup>72</sup> The borough president, city council members, and the mayor are elected every four years. Members of community boards and the CPC are appointed by elected officials (borough presidents appoint community board members,<sup>73</sup> and the mayor, borough presidents, and the public advocate appoint the members of the CPC<sup>74</sup>). Thus, the actions of all those involved in ULURP are subject to the political process: communities affected by development can express support for, or opposition to, the land use decisions made by elected officials and their appointees at the ballot box, and those officials and appointees are accountable to the electorate.

On the other hand, in most cases, the people who negotiate CBAs are neither elected nor appointed by the community or its elected representatives.<sup>75</sup> In those instances, community members have no way of holding the negotiators accountable for the conduct or outcome of the negotiations. Negotiators who are not well organized, who are weak or unskilled bargainers, or who do not represent the community’s interests can dominate the negotiations unchecked. Further, the lack of accountability may allow developers to choose to work with or appease some groups and ignore others.

CBA negotiations are not subject to requirements and procedures designed to ensure access to the policymaking process for all affected constituencies. For example, New York City’s ULURP specifically provides for two public hearings, first before the affected community board<sup>76</sup> and then before the City Planning Commission.<sup>77</sup> Legal rules govern the notice that must be provided to the affected communities to inform them of these hearings.<sup>78</sup> CBAs, on the other hand, may be negotiated privately, and the parties to the CBA may not give other affected interests either notice or an opportunity to be heard about the terms of the CBA.<sup>79</sup> CBAs are rarely (if ever) put to a vote of the community as a whole. Indeed, some of the CBAs negotiated in New York City in recent years were not even publicly available until just recently.<sup>80</sup>

The Atlantic Yards CBA in New York City is illustrative of the problem. In December 2003, Forest City Ratner (FCR) announced plans to construct a 19,000-seat arena for the NBA’s New Jersey Nets, along with housing, office and retail space, a hotel, and a parking garage, in Atlantic Yards in downtown Brooklyn. The twenty-one acre development would be the largest development in New York City outside of Manhattan in a quarter century.<sup>81</sup> Not surprisingly, the FCR proposal generated immediate skepticism and controversy. FCR embarked on a campaign to win support for the project, and as part of that campaign, raised the idea of a community benefits agreement. FCR convened a meeting of community groups,

---

<sup>72</sup> NYC Rules, title 62, ch 2. See generally, New York City Department of City Planning, *The Uniform Land Use Review Procedure (ULURP)*, online at <http://www.nyc.gov/html/dcp/html/luproc/ulpro.shtml> (visited Nov 10, 2009).

<sup>73</sup> New York City Charter § 2800(a)(1). The borough president must fill at least half of the seats with nominees from the council members representing the community district.

<sup>74</sup> New York City Charter § 192(a).

<sup>75</sup> See Gross, LeRoy, and Janis-Aparicio, *Community Benefits Agreements* at 11 (cited in note 1) (“CBAs are negotiated between leaders of community groups and the developer,” but noting that government agencies and staff may play a role in negotiations, especially “[i]n unusual circumstances, [when] a government entity may in fact be the ‘developer’ of a project . . . [and therefore] be central to the negotiations and a party to the CBA.”).

<sup>76</sup> NYC Rules, title 62, § 2-03(a)(1).

<sup>77</sup> NYC Rules, title 62, § 2-06(a).

<sup>78</sup> NYC Rules, title 62, § 2-02(a)(2).

<sup>79</sup> Some, perhaps most, of the community groups negotiating CBAs, however, have tried to maintain transparency regarding their negotiation process and the substance of those negotiations. See, for example, Gross, LeRoy, and Janis-Aparicio, *Community Benefits Agreements* at 22 (cited in note 1).

<sup>80</sup> Some of the CBAs negotiated in New York City have not been made readily accessible to the public. If they are kept in the files of government agencies as part of the review process, they may be subject to state freedom of information laws. See *Washington Post Co v New York State Insurance Department*, 463 NE2d 604, 606 (NY 1984) (holding that under the plain text of the state’s Freedom of Information Law, the term public records includes any “information kept, held, filed, produced . . . by, with or for an agency”). Other states allow access to records only when the records “have some relation to the official duties of the public officer that holds the record.” *Salt River Pima-Maricopa Indian Community v Rogers*, 815 P2d 900, 907 (Ariz 1991).

<sup>81</sup> Charles V. Bagli, *Deal Is Signed for Nets Arena in Brooklyn*, NY Times A1 (Mar 4, 2005).



including the New York chapter of Association of Community Organizations for Reform Now (ACORN), Brooklyn United for Innovative Local Development (BUILD), the Downtown Brooklyn Advisory and Oversight Committee (DBAOC), as well as members of the community boards<sup>82</sup> in whose jurisdictions the land fell. These groups began meeting regularly with FCR.<sup>83</sup> Other groups that had come out against the arena, such as Develop Don't Destroy Brooklyn and Prospect Heights Action Coalition, did not participate in the discussions,<sup>84</sup> although there is disagreement about whether they were excluded or refused to participate.

Within months, eight community organizations signed the Atlantic Yards CBA, while more than fifty community groups aligned in opposition.<sup>85</sup> Many interested observers have expressed concern that the signatory groups are not representative of the impacted constituencies. Lance Freeman, an assistant professor of Urban Planning at Columbia University, for example, criticized the Atlantic Yards CBA on the grounds that "there is no mechanism to insure that the 'community' in a CBA is representative of the community."<sup>86</sup>

The problem of representativeness is compounded by the taint of conflict of interest. The cooperation of at least one community group that signed the Atlantic Yards CBA, BUILD, followed closely behind FCR's financial contribution to the organization.<sup>87</sup> Indeed, BUILD was not incorporated until days before it announced its support for the development.<sup>88</sup> Shortly after the CBA was signed, FCR gave BUILD \$100,000, provided space and overhead for a BUILD office in the vicinity of Atlantic Yards, and donated computer equipment and furniture to the group.<sup>89</sup> FCR has since given BUILD additional funds and has provided funds for other signatories.<sup>90</sup>

Many groups negotiating CBAs have taken care to involve the community, protect against conflicts of interest, and insure an inclusive bargaining process. But there are no safeguards in place other than those the groups impose upon themselves: no mechanism for ensuring that those who claim to speak for the community actually do so; no guaranteed forum through which the community can express its views about the substance of the CBA or the wisdom of entering into a CBA; and no formal means by which the community can hold negotiators accountable for the success or failure of a CBA. These gaps give rise to a fear that developers will use CBAs as part of a divide and conquer strategy to "buy" off a few community activists in order to create the impression of broader community support than actually exists.<sup>91</sup>

<sup>82</sup> Some have criticized members of the community boards who negotiated with FCR, arguing that their participation granted FCR's negotiations an appearance of greater legitimacy. See Hugh Son, *Owner Neglecting Nets, Say Critics*, NY Daily News 1 (Nov 29, 2004) ("Several community board members have protested their leadership's involvement in talks with Forest City Ratner to secure neighborhood benefits, a move some view as lending support to the controversial project.").

<sup>83</sup> Mafruz Khan and Brad Lander, eds, *Slam Dunk or Airball? A Preliminary Planning Analysis of the Brooklyn Atlantic Yards Project* 14 (Pratt Institute Center for Community and Economic Development, Mar 2005), online at <http://dddb.net/documents/whitepapers/PICCED/bay-report.pdf> (visited Nov 10, 2009).

<sup>84</sup> See id. at 16; Develop Don't Destroy Brooklyn, *About the Ratner Plan: What is Bruce Ratner's "Atlantic Yards" Proposal?* (June 11, 2009), online at <http://www.dddb.net/php/aboutratner.php> (visited Nov 10, 2009); Bagli, *Deal Is Signed for Nets Arena*, NY Times at A1 (cited in note 81) (quoting the leader of the Prospect Heights Action Coalition, who explained the group's view that the "project is too big," would amount "to supersiz[ing] Brooklyn[,] and would result in "1,000 people [ ] los[ing] their jobs or homes because of the project").

<sup>85</sup> See Develop Don't Destroy Brooklyn, *Organizations That Are Opposed to or Deeply Concerned about the Proposed Forest City Ratner Nets Arena, 16 Highrise Tower Proposal for Brooklyn* (2009), online at <http://www.dddb.net/php/opposition.php> (visited Nov 10, 2009); Nicholas Confessore, *The People Speak (Shout, Actually) on Brooklyn Area Project*, NY Times B1 (Oct 19, 2005).

<sup>86</sup> Lance Freeman, *Atlantic Yards and the Perils of Community Benefit Agreements*, Planetizen Contributor Blog (May 7, 2007), online at <https://www.planetizen.com/node/24335> (visited Nov 10, 2009) (criticizing the Atlantic Yards CBA). See also New York City Council Committee on Economic Development, Public Hearing on the Proposed Brooklyn Atlantic Yards Project (May 6, 2005) (comments of Bettina Damiani, Project Director, Good Jobs New York) ("*Damiani Comments*"), online at [http://www.goodjobsny.org/testimony\\_bay\\_5\\_05.htm](http://www.goodjobsny.org/testimony_bay_5_05.htm) (visited Nov 10, 2009) ("The BAY project has so far demonstrated one of the major weaknesses of CBAs—in terms of 'community' input, they are only as broadly representative as the groups that negotiate them.").

<sup>87</sup> Juan Gonzalez, *BUILD Admits Ratner Funding*, NY Daily News 22 (Oct 18, 2005).

<sup>88</sup> Matthew Schuerman, *Ratner Sends Gehry to Drawing Board*, NY Observer 13 (Dec 5, 2005) (reporting that only two of the eight groups that signed the Atlantic Yards CBA were incorporated prior to the negotiations).

<sup>89</sup> Nicholas Confessore, *To Build Arena in Brooklyn, Developer First Builds Bridges*, NY Times A1 (Oct 14, 2005).

<sup>90</sup> Matthew Schuerman, *Out of the Woods?*, NY Observer (Oct 19, 2005), online at <http://www.observer.com/node/33929> (visited Nov 10, 2009). See also Matthew Schuermann, *Ratner's Gift*, NY Observer (June 9, 2006), online at <http://www.observer.com/node/34828> (visited Nov 10, 2009).

<sup>91</sup> Amy Lavine, *Atlantic Yards CBA*, Community Benefits Agreements Blog (Jan 29, 2008), online at <http://communitybenefits.blogspot.com/2008/01/atlantic-yards-cba.html> (visited Nov 10, 2009). See also Freeman, *Atlantic Yards* (cited in note 86); Kenneth Fisher, *Complex Policy Choices in Managing Growth*, 237 NY L.J. 58 (Jan 16, 2007).

B. Will Those Who Negotiate for the Community Drive an Appropriate Bargain?

Even if those at the bargaining table do indeed speak for the community, there is no guarantee that they will secure a good bargain.<sup>92</sup> Representatives of the community may be hampered by inexperience in negotiating with developers who have made a life's work out of hard bargaining. Community representatives may lack the resources to ascertain what would be the best terms for the community. The terms of CBAs are not always made public, so it is difficult for the bargainers to assess what is an appropriate agreement.<sup>93</sup> Further, negotiators likely are members of community groups who stand to benefit from the terms of the CBA (even if not from direct contributions from the developer<sup>94</sup>) and therefore may have conflicts of interest in assessing what the community should ask for.

The benefits obtained also are not always easy to value. Negotiations sometimes requires valuation of parkland, trees, parking spaces, and other amenities that are being lost to the development, and a comparison of the value of those amenities to the value of substitutes. Such valuations and comparisons are notoriously problematic and controversial.<sup>95</sup>

C. Will Negotiations over a CBA Result in Neighborhood-by-Neighborhood Solutions to Problems That Would Better Be Addressed on a Citywide Basis, or Otherwise Harm the Interests of the Local Government As a Whole?

The terms of a CBA very well may affect negotiations between the developer and elected or appointed officials in the public approval process, depending upon how the timing of the CBA negotiations relates to the land use process. The community negotiating the CBA may capture benefits that would have gone instead to the broader community if CBAs were not allowed. Or the community may bargain for one type of benefit and thereby reduce the ability of elected officials in the public approval process to get a different kind of benefit that would have been more appropriate for the city as a whole.

Further, while the benefits incorporated into CBAs may address important needs, such as affordable housing, critics contend that these issues should be confronted citywide, rather than on a neighborhood-by-neighborhood basis.<sup>96</sup> A citywide approach would be more likely to channel resources into the neighborhoods that need them most, which may not be the neighborhoods that happen to be getting development. Indeed, it may often be the case that the neighborhoods in which developments are proposed are among the least needy of a local government's communities.

A jurisdiction-wide approach to the local government's needs is likely to be more comprehensive, better planned, and better integrated with the local government's other initiatives. The Atlantic Yards CBA, for example, promises to provide affordable housing but envisions that the housing will draw upon various public subsidy programs.<sup>97</sup> Those public subsidies are limited resources, and the provision of affordable housing of a particular type and in a particular neighborhood pursuant to a CBA may distort local, state, or federal

---

<sup>92</sup> *Damiani Comments* (cited in note 86); Gross, LeRoy, and Janis-Aparicio, *Community Benefits Agreements* at 22–23 (cited in note 1). For evidence of how communities fared in similar negotiations over undesirable land uses, see Been, 21 *Fordham Urban L J* at 811–22 (cited in note 3).

<sup>93</sup> See Been, 21 *Fordham Urban L J* at 825–26 (cited in note 3) (discussing how confidentiality agreements over compensated siting agreements hampered communities bargaining over such agreements).

<sup>94</sup> See text accompanying notes 87–90.

<sup>95</sup> See, for example, Richard L. Revesz and Michael A. Livermore, *Retaking Rationality: How Cost-Benefit Analysis Can Better Protect the Environment and Our Health* 55–129 (Oxford 2008) (discussing various theoretical challenges to accurate measurement of benefits); Eduardo M. Peñalver, *Land Virtues*, 94 *Cornell L Rev* 821, 846–53 (2009) (discussing cost-benefit analysis in the context of land valuation).

<sup>96</sup> *Damiani Comments* (cited in note 86) (“Community residents who have not been part of the negotiation, but have expressed concerns about [negotiated benefits] . . . have not had a way to include these concerns in the negotiation process . . . [W]ithout broad, cross-cutting organizing, such ‘CBAs’ can become a mechanism for dividing the community rather than uniting it.”).

<sup>97</sup> See Atlantic Yards Development Co., *Community Benefits Agreement* at § VI(B)(2)(b) (cited in note 9) (relying on “governmental contributions for site development and affordable housing subsidies”); id at exhibit D, annex A:

[T]he ACORN/ATLANTIC YARDS 50/50 Program will utilize existing Housing Development Corporation (HDC) bond programs and Department of Housing Preservation and Development (HPD) programs, with necessary modifications. The program may also utilize existing Housing Finance Agency (HFA), Affordable Housing Corporation (AHC) or Housing and Urban Development (HUD) programs, with necessary modifications.

government priorities for spending those resources. The subsidies might go much further if used for other developments, but local government officials understandably might be reluctant to refuse to subsidize affordable housing promised in a particular CBA and thereby risk having to take “blame” for the development’s failure to provide community benefits.<sup>98</sup>

Diversion of benefits from the local government as a whole to the host neighborhood also may result in greater inequality among the local government’s neighborhoods. Many neighborhoods within a local government will not be zoned for major development or will not have the infrastructure or underused land required for such development. Those communities may share in any benefits of development that are obtained in the public approval process. If CBAs divert benefits from the local government as a whole, however, those neighborhoods may see little of the benefits from the local government’s growth.

#### D. Will CBAs Considered in the Land Use Process Trigger *Nollan* and *Dolan* and Other Legal Limits on Exactions—Are They Legal?

As noted in Part I.C, the Supreme Court’s decisions in *Nollan* and *Dolan* imposed nexus and proportionality requirements on local governments’ demands for exactions in the land use approval process, at least where those exactions are negotiated on a case-by-case basis.<sup>99</sup> The state courts have imposed additional restrictions on the use of exactions.<sup>100</sup> While the courts do not seem to have been confronted yet with a claim that CBAs trigger those same restrictions, such a claim would have at least a reasonable basis in the law in some circumstances. If the “leverage” community groups have to convince developers to enter into negotiations stems from an explicit or implicit requirement that landowner enter into a CBA before seeking government approval of the land use proposal, the courts may view the negotiations as posing no less (and perhaps more) risk of “extortion,” to use the *Nollan* Court’s term,<sup>101</sup> than the local government’s processes at issue in that case. Government officials reportedly sometimes have suggested the need for the agreements,<sup>102</sup> and indeed, even have been involved in the negotiations.<sup>103</sup> Further, the agreements often have been reached and announced at the eleventh hour before crucial government votes on the land use proposals.<sup>104</sup> Courts therefore may find sufficient government involvement in the negotiations themselves to trigger the legal restrictions that apply to the government. To the extent that there are formal or informal “requirements” that developers enter into CBAs prior to seeking government approval of their land use plans, the courts’ prohibitions on neighborhood

---

<sup>98</sup> It is telling that those charged with administering New York City’s affordable housing programs, such as the Department of Housing, Preservation and Development, were silent about the city’s willingness to provide the subsidies that the Atlantic Yards CBA anticipated would enable the developer to provide the affordable housing “promised” in the agreement. See generally New York City Department of Housing Preservation and Development, *Mayor Michael R. Bloomberg, Forest City Ratner CEO and President Bruce Ratner and Civic Leaders Sign Community Benefits Agreement* (June 27, 2005), online at <http://www.nyc.gov/html/hpd/html/pr2005/mayors-release248-05-pr.shtml> (visited Nov 18, 2008).

<sup>99</sup> For a discussion of whether, and how, *Nollan* and *Dolan* apply to takings challenges brought against development impact fees, see Michael B. Kent, Jr., *Theoretical Tension and Doctrinal Discord: Analyzing Development Impact Fees as Takings*, 51 Wm & Mary L Rev \*37–50 (forthcoming 2010), online at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1456371](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1456371) (visited Oct 29, 2009) (proposing a hybrid test combining *Nollan* and *Dolan* with standard non-exaction takings claim analysis and then applying this test to three hypothetical fact patterns).

<sup>100</sup> Mark Fenster, *Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions*, 58 Hastings L J 729, 762–63 (2007). See also Andrea B. Pace, Note, *Utah Leads the Way in Regulating Land Use Exactions through Statute but Still Has Room to Improve*, 21 BYU J Pub L 209, 221–25 (2007).

<sup>101</sup> 483 US at 837 (referring to a requirement that an owner provide an easement across part of his property as a condition of granting a permit to build a house as “an out-and-out plan of extortion”).

<sup>102</sup> See, for example, Bill Egbert, *Coalition Waging Battle with Armory Developer for Kingsbridge Benefits*, NY Daily News 72 (Apr 25, 2008).

<sup>103</sup> See, for example, Alex Kratz, *Diaz Stalls on Amory [sic] Project, Waits for Response on Draft Benefits Agreement from Developer*, Bronx News Network (Aug 21, 2009), online at <http://www.bronxnewsnetwork.org/2009/08/diaz-stalls-on-amory-project-waits-for.html> (visited Nov 10, 2009).

<sup>104</sup> See, for example, Timothy Williams and Ray Rivera, *\$7 Billion Columbia Expansion Gets Green Light*, NY Times A1 (Dec 20, 2007); Columbia Office of Communications and Public Affairs, *Columbia, Local Development Corporation Reach Long-Term Collaboration Agreement on Enhanced Education, Health Care, Jobs, Affordable Housing and Other Civic Programs* (Dec 19, 2007), online at <http://www.columbia.edu/cu/news/07/12/agreement.html> (visited Nov 10, 2009); Scott M. Stringer, *BP Stringer Announces Agreement with Columbia University to Protect and Enhance West Harlem Community as Part of Columbia Expansion Proposal* (Sept 26, 2007), online at <http://neighbors.columbia.edu/pages/manplanning/pdf-files/Stringer%20AnnPrpsl%20SP.pdf> (visited Nov 10, 2009) (announcing the Manhattan borough president’s support for Columbia University expansion and that Columbia agrees to provide specific benefits to the neighboring area).

consent requirements also may be applicable.<sup>105</sup> Finally, to the extent that elected officials suggest that administrative agencies such as the local planning commission should not approve proposals unless the developer has entered into a CBA, as some are reported to do, courts may find that the elected official's participation in any subsequent council vote on the agency's decision creates an appearance of bias.<sup>106</sup>

The purpose of this Article is not to answer those questions definitively. The questions are sufficiently well grounded, however, to raise considerable concern about the legality of CBAs.

#### E. Will CBAs, Even if "Legal," Compromise Sound Planning and Land Use Regulation?

In *Nollan*, the Supreme Court cautioned that the use of land use exactions could paradoxically lead to underenforcement of the jurisdiction's land use regulations.<sup>107</sup> The Court suggested that a municipality that enacts strict regulations but waives those regulations in exchange for the benefits secured by exactions might achieve fewer of its genuine land use objectives than if it enacted a less strict but non-waivable regime.<sup>108</sup> In similar fashion, in local governments whose neighborhoods become dependent on the benefits conveyed by CBAs, both the local government and community groups may lose sight of larger, long-term land use objectives and "sell" development approval too cheaply, leaving the community insufficiently protected from the harms that urban developments may impose.

Indeed, critics of various projects that involved CBAs assert that the existence of the CBA led land use officials to approve developments that otherwise might not have been approved, at least without significant modification.<sup>109</sup> Opponents point to provisions such as the Atlantic Yards CBA's provision of sports tickets and decry those benefits as essentially "buying" support.<sup>110</sup>

#### F. Will CBAs Chill Appropriate Development?

In some instances, a community's insistence that the developer enter into a CBA to provide benefits to the community may deter development that the neighborhood or the local government as a whole actually might prefer to have.<sup>111</sup> Negotiators must exercise judgment about how hard to push for benefits, and such judgments require negotiating experience, information about competitor cities, analysis of market trends, and other forms of expertise that community groups bargaining over a CBA may not have.

#### G. Will CBAs Be Difficult to Enforce Legally, or Will They Contain Terms That Would Be Time-Consuming and Costly to Monitor or That Are Too Vague to Be Enforced?

Monitoring and enforcing promises made to host communities pose significant challenges for those communities.<sup>112</sup> In some cases, CBAs are phrased in aspirational terms that make it hard to determine exactly what is being promised. In the Atlantic Yards CBA, for example, the developer's commitments often are phrased in terms, such as "the developers

---

<sup>105</sup> See, for example, *Seattle Title Trust Co v Roberge*, 278 US 116, 120–22 (1928) (holding that an ordinance requiring the consent of neighboring property owners before a building permit would be issued violated the Due Process Clause by delegating authority over permits from the government to local landowners); *Thomas Cusack Co v City of Chicago*, 242 US 526, 527–31 (1917) (holding to be constitutional an ordinance restricting the erection of billboards but providing for an exception if one-half of the neighboring property owners choose to lift the restriction because the restriction was imposed by the government rather than the neighbors); *Eubank v City of Richmond*, 226 US 137, 140–44 (1912) (holding that an ordinance allowing two-thirds of the property owners on a street to regulate how other owners could use their property on that street, without any standards or government oversight, violated the Equal Protection and Due Process Clauses).

<sup>106</sup> See generally, for example, *Prin v Council of Municipality of Monroeville*, 645 A2d 450 (Pa Commw Ct 1994) (holding that a councilman's appearance before an administrative body to oppose property development plan should have precluded him from participating in the council's vote on the applications).

<sup>107</sup> 483 US at 837 n 5.

<sup>108</sup> *Id.*

<sup>109</sup> Confessore, *The People Speak*, NY Times at A1 (cited in note 89).

<sup>110</sup> Terry Pristin, *In Major Projects, Agreeing Not to Disagree*, NY Times C6 (June 14, 2006); *BUILD: Bribe Us in Large Denominations*, noLandGrab Blog (Sept 29, 2005), online at [http://www.nolandgrab.org/archives/2005/09/nolandgrab\\_comm\\_1.html](http://www.nolandgrab.org/archives/2005/09/nolandgrab_comm_1.html) (visited Nov 10, 2009).

<sup>111</sup> Salkin, *Understanding Community Benefits Agreements* at 1423 (cited in note 11).

<sup>112</sup> Salkin and Lavine, 26 UCLA J Envir L & Pol at 324 (cited in note 11); Gross, LeRoy, and Janis-Aparicio, *Community Benefits Agreements* at 69–72 (cited in note 1).

agree to work . . . towards the creation of a [h]igh [s]chool”<sup>113</sup> or the developers “will seek to”<sup>114</sup> and “intend” to do various things but do not actually commit the developers to do those things.<sup>115</sup> Other provisions defer specifics, noting, for example, that FCR will provide space for a community health center “at rent and terms to be agreed upon.”<sup>116</sup> Further, some promises are subject to liquidated damages clauses—FCR can “buy-out” its obligation to provide a pre-apprentice training program, for example, by making a one-time payment of \$500,000 to the community coalition.<sup>117</sup>

Some CBAs do not include terms such as the timeframe for commitments to be fulfilled, who will monitor performance, how and when information on performance will be made available, and what will happen if the commitment is not fulfilled.<sup>118</sup> In other instances, community groups may have lacked the legal expertise to negotiate usable enforcement provisions.<sup>119</sup> Even when monitoring and enforcement terms are included in CBAs, tracking benefits more complex than one-time financial payments, such as living wage and local hiring requirements, presents practical administrative challenges.<sup>120</sup> Finally, because there oftentimes remains mutual skepticism between community groups and developers, monitoring may be especially costly.<sup>121</sup> Community groups may be reluctant to rely on a developer’s reports, for example, and attempt to verify figures independently.<sup>122</sup> Such independent analysis could be burdensome for a number of reasons, including the fact that the relevant information may be contained in a developer’s private records of wages and hiring decisions.<sup>123</sup>

Finally, while CBAs may meet the legal requirements for contracts, the remedies for a breach of the contract are unclear.<sup>124</sup> There are no federal or state cases yet squarely addressing legal issues involving the enforcement of CBAs. Numerous problems arise: if the public approval process was influenced by the existence of a CBA, for example, and the developer later breaches the CBA, should the remedy for the community be revocation of any approvals given in the public process?<sup>125</sup>

In a small percentage of cases, CBAs are folded into a development agreement, and in these instances local governments assume monitoring and enforcement responsibilities.<sup>126</sup> Usually, however, community groups are on their own to ensure that the promises contained in the agreement are kept.<sup>127</sup>

#### IV. THE APPROPRIATE ROLE FOR CBAS

Many local governments have been inconsistent in their stance on CBAs. During the heated real estate boom of the early 2000s, some local governments suggested (or even informally required) that developers negotiate CBAs with communities in order to gain support for ambitious projects. At the same time, concerns that CBAs are tantamount to “zoning for

<sup>113</sup> Atlantic Yards Development Co, *Community Benefits Agreement* at 16 (cited in note 9).

<sup>114</sup> *Id.* at 17.

<sup>115</sup> *Id.* at 13 (“The Developers will use good faith efforts to meet the overall goal . . .”); *id.* at 16 (“Developers . . . will work . . . to the extent feasible, to have [Minority and women] employees . . .”); *id.* at 40 (“Developers will use good faith efforts to meet the overall goal . . . be seeking to employ persistently unemployed young people.”); *id.* at 41 (“Developers shall . . . dedicate such resources as it seems reasonably necessary to fulfill its obligations hereunder.”).

<sup>116</sup> *Id.* at 27 (describing the agreed upon “Community Amenities and Facilities”).

<sup>117</sup> Atlantic Yards Development Co, *Community Benefits Agreement* at 14 (cited in note 9).

<sup>118</sup> Gross, Leroy, and Janis-Aparicio, *Community Benefits Agreements* at 69–72 (cited in note 1).

<sup>119</sup> See *id.* at 23.

<sup>120</sup> *Id.* at 70–71.

<sup>121</sup> *Id.*

<sup>122</sup> See Gross, Leroy, and Janis-Aparicio, *Community Benefits Agreements* at 70–71 (cited in note 1).

<sup>123</sup> *Id.*

<sup>124</sup> Erik Engquist, *Developers’ Deal-Making Escalates: Community Benefit Agreements Become Costly as Bloomberg Endorses Concept*, *Crain’s NY Bus 1* (Mar 27, 2006).

<sup>125</sup> See Nolan M. Kennedy, Jr, Note, *Contract and Conditional Zoning: A Tool for Zoning Flexibility*, 23 *Hastings L J* 825, 836–37 (1972). Consider *City of Knoxville v Ambrister*, 263 SW2d 528, 530–31 (Tenn 1953) (holding that a developer’s promise to dedicate land for use as a park in exchange for an amendment to the city zoning ordinance was illegal and would not be enforced).

<sup>126</sup> Gross, LeRoy, and Janis-Aparicio, *Community Benefits Agreements* at 10 (cited in note 1); Salkin, *Understanding Community Benefit Agreements* at 1409 (cited in note 11).

<sup>127</sup> Gross, LeRoy, and Janis-Aparicio, *Community Benefits Agreements* at 70–71 (cited in note 1) (recognizing that it is difficult for local governments to monitor and enforce CBAs that have not been incorporated into development agreements).

sale” and may run afoul of the *Nollan-Dolan* “essential nexus” test have led many local governments to be wary of appearing to approve or be involved in the agreements. The result is considerable confusion about how local governments will respond to CBAs.

Local governments basically have three broad options. First, they can announce that they will not consider CBAs in the land use process, will give no “credit” to developers for benefits they have provided through CBAs, and will play no role in monitoring or enforcing the agreements. Second, they can agree to consider CBAs, but only if the agreement and the process by which it was negotiated meets certain standards. Third, they can agree to consider CBAs (with the standards specified) only in decisions relating to subsidies that the local government is providing to the proposed development.

#### A. Refusing to Consider CBAs in the Land Use Approval Process

Local governments may announce that consideration of CBAs in the land use process is inappropriate and that all elected or appointed officials with a role in the land use approval process are prohibited from suggesting that developers seeking land use approvals enter into CBAs, participating in discussions between developers and community groups about CBAs, or considering the existence of a CBA or the specific terms of the CBA in deciding whether to approve a developer’s request for a map or text amendment, special permit, variance, or other discretionary land use approval. The ban would have to extend to environmental review processes: local governments would need to refuse to take into account the terms of any CBAs in assessing the impact of the proposed project (unless those terms are incorporated in the development agreement between the developer and the local government, and otherwise meet the requirements for environmental mitigation measures).

To ensure that the existence or terms of CBAs are not considered inappropriately, local governments should require developers seeking any discretionary approval (such as rezonings, variances, and special permits) to report, in their application, any agreements negotiated with individuals or community groups and to make public the terms of those agreements before the final public hearing on the proposal.

#### B. Considering CBAs in the Land Use Process if the CBA and the Processes by Which It Was Negotiated Meet Certain Standards

A local government may decide that CBAs are inexorable or that they are helpful adjuncts to the land use process. The dangers outlined above suggest, however, that local governments considering CBAs in the land use process should impose safeguards that address the following issues:

##### 1. Nexus to land use concerns.

Local governments should allow consideration in the land use process only of those CBAs (or portions of a CBA) that impose requirements that seek to directly address impacts the development will impose on the local community that fall within the jurisdiction of land use authorities. Agreements (or provisions of agreements) that address matters falling outside the local government’s land use authority (as living wage requirements or union labor requirements might) should not be allowed to influence the land use review process.

##### 2. Transparency.

Local governments should require developers seeking any discretionary approval to report, in their application, any agreements negotiated with individuals or community groups, and to make public the terms of those agreements, before the final public hearing on the proposal.

##### 3. Representativeness.

Local governments should consider only those CBAs that are negotiated by groups selected through a transparent process that opens the negotiations to as many community groups as possible, ensures that the developer is not “cherry picking” the groups the

developer thinks will be easiest to negotiate with, and provides some check on the legitimacy of a group's claims to represent the neighborhood. At the same time, the process for ensuring that negotiators are representative of the community must not enable elected or appointed officials to "pack" the negotiations with groups favorable to the officials' stance on the proposed development.

#### 4. Accountability.

It is difficult to make those who negotiate CBAs accountable to the community because they are not elected. Should a local government decide to allow CBAs to be considered in the land use process, it should consider whether the elected officials closest to the community should be required to approve any community benefit agreements that will be taken into account. Of course, local governments should conduct a thorough analysis of the implications of having such elected officials "approve" the agreement. That analysis should consider whether such participation would trigger *Nollan* and *Dolan* in circumstances that otherwise would not implicate those restrictions, implicate conflict of interest restrictions, or trigger requirements for public hearings.

#### 5. Ensuring that citywide interests are not compromised.

As discussed in Part III, CBAs may compromise the interests of the local government as a whole in several ways: by diverting resources that the local government might otherwise have received from the developer and chosen to spend in other neighborhoods or on other issues; by making it more likely that the local government will approve development that is inappropriate; and by committing the local government's own resources to projects that it might not have prioritized absent the CBA. To limit the ability of CBAs negotiated as part of the subsidy process to have such effects, the relevant agencies should be required to certify that they have reviewed any promises in a CBA that implicate the local government's resources or are based upon assumptions about government subsidies, and to reveal whether they plan to devote the resources required for the project pursuant to a citywide plan to address the need at issue.

#### 6. Ensuring enforceability of the agreement.

To address the difficulty community groups may have enforcing the CBA, the local government should require that the terms of any CBA be made part of the development agreement (or similar codification of promises) between the local government and the developer. Inclusion of the terms in a development agreement or other official agreement would allow the local government to enforce those terms without precluding the ability of community groups to enforce the CBA as well.

### C. CBAs in the Land Use Regulatory Process versus CBAs in the Economic Development Practices

In many local governments, the agency charged with economic development provides various incentives for developers to encourage projects the local government believes will benefit the jurisdiction. Some such agencies have required or encouraged developers receiving those subsidies to enter into CBAs with the host community. CBAs negotiated as a condition for the receipt of government subsidies raise very different issues from the CBAs negotiated as part of the process of land use review. When a local government chooses to provide subsidies to developers, it is free to condition those subsidies in any way it thinks appropriate (subject to general prohibitions on discrimination, corruption, and so on). Developers who object to the conditions imposed are free to decline to be involved in the project. Those who do seek subsidies from the public must take the bitter with the sweet; if they do not like the conditions, they can simply forego the subsidies (or seek to convince the government that it cannot accomplish its economic development goals if it conditions the subsidies).

The difficulty, however, is that land use processes and economic development processes often are not so easily separated. Subsidies provided for economic development often include

transfers of a local government's land or the use of eminent domain to assemble land, and will almost always involve a rezoning or other land use approval. Accordingly, if CBAs are used in the economic development process, safeguards must be in place to ensure that their influence in the land use process is appropriate.

If a local government refuses to recognize CBAs in the land use process, it may nevertheless decide that CBAs are appropriate considerations in its decisions to grant subsidies or contracts to developers through the economic development process. In that case, the local government should make clear that, to the extent possible, the CBA will be considered only in the decision whether and to whom to award the subsidy, not in any decisions relating to land use approvals for specific projects. It also should impose the safeguards discussed above on the CBAs negotiated as part of the subsidy process.

If a local government instead recognizes CBAs in the land use process, it should apply the same safeguards to CBAs negotiated as a requirement for subsidies that it applies to those considered in the land use process.

### CONCLUSION

CBAs are the latest in a series of tools that local governments and community groups have used to try to ensure that development pays its way, mitigates the harms it causes, and provides benefits to the communities it burdens. The goal is appropriate, but the history of such tools shows that negotiations between developers on the one hand, and either land use officials or community groups on the other, may lead to real or perceived conflicts of interest, compromise land use approval processes, and foster rent-seeking. CBAs accordingly must be carefully circumscribed. While they may be appropriate conditions to impose upon developers in return for economic development subsidies, local governments should reject any consideration of CBAs in the land use approval process or recognize only those CBAs that meet both substantive and procedural standards designed to limit their potential threats. Where the economic development process and the land use process will be inextricably intertwined, such that it will be difficult to ensure that a CBA negotiated in exchange for economic development subsidies has not infected the land use process, the local government again should put into place safeguards that will limit the dangers the CBAs pose.

The advent of CBAs is an important signal that neighborhoods do not believe that current land use processes are adequately protecting their interests. Local governments pressured to allow CBAs, therefore, should take the opportunity provided by the economic downturn to thoughtfully consider that dissatisfaction and to refine their land use approval processes to ensure a more effective and satisfying role for community input early in the approval process.





# Community Benefits Agreements\*

Julian Gross

## Introduction

In recent years, many large urban development projects have gone forward in conjunction with community benefits agreements (CBAs). CBAs have generated tremendous excitement among community groups and advocates of equitable development, as well as substantial interest in local government, academia, the media, planning circles, and philanthropic foundations. This new approach has led to exceptional results in some cases, and it holds tremendous promise as a means of ensuring delivery of community benefits on controversial development projects. However, CBAs have the potential for misuse and have substantial limitations as a long-term strategy in community economic development. For these reasons, CBAs should not supplant broader efforts to improve the land use development process, especially in low-income urban areas.

The first several CBAs were negotiated in California in the early 2000s, most frequently in Los Angeles. In 2008, prominent CBAs came to fruition in several more cities around the country, including Seattle, Pittsburgh, and San Francisco. The San Francisco CBA, addressing issues of affordable housing and job training funds in a large project in the low-income Bayview

\* Sections of this chapter were derived from J. Gross, *Community Benefits Agreements: Definitions, Values, and Legal Enforceability*, 17 J. AFFORDABLE HOUSING & COMM. ECON. DEV. L. 1-2, 59-76. Thanks to Elizabeth Q. Hinckle and to Sebrina Owens-Wilson for research assistance, and to Kathleen Mulligan-Hansel for review of early drafts.

### SUPPORT FOR CBAS BY PUBLIC OFFICIALS

Several prominent public officials have emphasized CBAs' role in improving development projects and building community consensus. San Francisco Mayor Gavin Newsom said about the 2008 Bayview CBA: "[B]uilding support for a large, mixed-use project in a disadvantaged neighborhood is a real challenge. . . . By bringing a coalition of labor and community groups to the table, the CBA process built trust, support, and credibility for this vital project." Similarly, Seattle Mayor Greg Nickels said of the 2008 Dearborn Street CBA: "I applaud the parties for coming to an agreement on the Dearborn Goodwill project. This Community Benefits Agreement is a new approach, bringing together the interests of community, housing, labor and business." Other officials have emphasized CBAs' ability to create accountability around developers' commitments. Pittsburgh City Council member Toriya Payne stated: "Without a CBA in place, we ran the risk of the developer making promises, then saying, 'sorry, but things have changed . . . .' With a CBA, there are consequences if the developer doesn't come through."

neighborhood, contained over \$100 million of commitments on behalf of Lennar, one of the nation's largest housing developers.<sup>1</sup> Also in recent years, New York City has seen several controversial projects go forward in conjunction with agreements termed CBAs, but coming under widespread criticism.<sup>2</sup>

CBAs have been written about extensively, with many articles setting forth detailed case studies.<sup>3</sup> Community groups' interest in CBAs has in many cases been matched by that of public officials (see sidebar), who see CBAs as a way to bring many parties to the table and generate support for important projects, helping get beyond the bitter conflicts that have often characterized urban redevelopment efforts.

This chapter provides an overview of the CBA approach, briefly discusses several legal issues that may arise in CBA drafting and implementation, describes political factors underlying the emergence of this approach, and discusses appropriate roles for public and private actors in CBA negotiations. Endnotes and a "Resources" section point toward additional sources of information; the endnotes contain many examples of best practices and illustrative language.

## Definition and Overview

A community benefits agreement is a legally binding, private contract between a developer and community-based organizations, under which the developer commits to providing specified community benefits through a proposed development project, and participating community groups agree to support the project in the governmental approval process.<sup>4</sup> Community groups generally agree to release legal claims regarding the proposed project as well.

CBAs have included commitments by developers to institute local hiring programs, provide affordable housing, ensure payment of living wages, provide funds for job training or other community needs, provide

parks or open space, and provide environmental benefits and mitigations.<sup>5</sup> Many CBAs include community benefits narrowly relevant to the project in question—like project-specific design standards, or space for community-serving nonprofits. The community benefits contained in any particular CBA are the result of the priorities of community-based organizations, the developer, and sometimes local government; parameters of the project, financial and otherwise; and of course, the outcome of the negotiation process.

Developers' commitments made in CBAs are legally binding and are enforceable by the signing community groups. Also, to fulfill the purposes of a CBA, developers' commitments often need to run against other parties such as subsequent landowners, commercial tenants in the completed project, and various contractors that will operate in the project during construction and after opening. CBAs therefore need to contain complex contractual language regarding differing responsibilities of these entities; see the discussion under "Successors, Assigns, and Agents."

CBAs always contain obligations of support for the project on the part of signing community organizations. This support can include explicit, affirmative support steps, such as hearing attendance and testimony, support letters, or media efforts; general obligations not to oppose the project, privately or publicly; and a release of administrative claims regarding the project. CBAs usually require signing community organizations to release specified legal claims regarding the project as well. These support obligations are legally binding and enforceable by the project developer.

CBAs have been most frequently negotiated regarding large, multiuse urban redevelopment projects. Such projects have a range of potential impacts and benefits that are likely to affect many constituent groups within the surrounding community, such as affordable housing advocates, labor unions, neighborhood organizations interested in local jobs, and environmental justice advocates. Many urban areas have had a strong development market during the past decade, enhancing the ability of both local government and community advocates to negotiate with developers. In addition, urban areas are more likely than rural areas to have a range of active, engaged community advocates—and elected officials willing to consider their views. These factors and others make a large housing and retail project in an urban area the prototypical development project for CBA negotiations.

Because the term "CBA" has been used to describe many different things, it is important for practitioners and advocates to understand what things are *not* CBAs. The following types of policies or programs, while related to land use development and community benefits, should not be considered CBAs:

*Ordinances or policies imposing specific requirements on a range of projects around a city.* Examples include inclusionary zoning ordinances, local hiring or living-wage policies that cover multiple development projects, and so forth.<sup>6</sup>

*Policies requiring specified community benefits on projects in a specific redevelopment area.*<sup>7</sup> Such policies are not specific to a particular development

project; and to take effect, they almost always need additional legal steps such as negotiation into a development agreement.<sup>8</sup>

*Unenforceable statements of policy or intention regarding community benefits on a specific development project.* Examples include agreements to negotiate in the future<sup>9</sup> and general statements regarding intention to hire local workers in a project. If a document does not purport to be legally enforceable, or if the commitments it specifies are so vague and qualified as to be unenforceable or meaningless in practice,<sup>10</sup> it should not be considered a CBA.

CBAs have varying relationships to development agreements. Development agreements often contain commitments that clearly should be considered community benefits, and these terms may overlap with terms negotiated in a private CBA. Indeed, in several cases, development agreements have explicitly incorporated as material terms the slate of community benefits that was originally negotiated in a private CBA.<sup>11</sup> Nonetheless, it is important to remember that even on a project with both a CBA and a development agreement, these are separate documents with different parties negotiating them and possessing enforcement rights.

Despite the crucial contextual importance of governmental control over approval of the proposed project, CBAs remain private contracts that are voluntary for the developer. Developers enter into CBAs to generate public support for their projects and to obtain a release of potential legal claims, but they are not required to do so; they are always free to make their arguments for project approval without the support of community advocates. The legal status of CBAs as private contracts frees them from the range of limitations on governmental action, such as the takings clause and various other constitutional and statutory restrictions. The broad legal and practical flexibility of the CBA approach gives parties tremendous opportunity to develop innovative, mutually beneficial solutions to the complex range of potential conflicts inherent in planning large urban development projects.

## Legal Issues Presented by CBAs

While CBAs arise in a very specific setting, framed by the elaborate legal requirements of land use development involving multiple public and private parties, the primary legal issues relevant to CBAs are simply those relevant to private contracts—albeit complex, multiparty contracts. Intention of the parties, successorship and assignment, enforcement mechanisms, consequences of noncompliance or partial compliance, joint and several liability, and application of contract language to changed circumstances are some issues that will be relevant to interpreting and enforcing a CBA. Contract law in the various states will govern interpretation of these issues and may present other issues as well.

Several of these issues are discussed briefly below, in a manner necessarily general in light of variance between the laws of different states and

of differences in language and factual circumstances surrounding different CBAs. In addition, because community groups generally negotiate a CBA as a coalition, the legal status of the coalition and related contractual issues are addressed.

## Consideration

Because private CBAs are a new legal tool, some observers have raised questions about the basics of the bargain involved. Some scholars and commentators have asked whether the consideration provided by community groups under a private CBA is sufficient to support a contract.<sup>12</sup> Given the high hurdles for legal claims based on insufficiency of consideration—and the substantial nature of the consideration provided in most private CBAs—such a claim would be highly unlikely to succeed.

The commitments made by community groups in a typical CBA—support for the project in public settings, and release of legal claims—clearly constitute valid consideration because they are bargained for by the developer and are of value to the developer. See 2008 *Restatement (Second) of Contracts* § 71:

(1) To constitute consideration, a performance or a return promise must be bargained for. (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise. (3) The performance may consist of (a) an act other than a promise, [or] (b) a forbearance. . . . (4) The performance or return promise may be given to the promisor or to some other person.

See also § 72: “Except as stated in §§ 73 and 74, any performance which is bargained for is consideration”; and § 74(2):

The execution of a written instrument surrendering a claim or defense by one who is under no duty to execute it is consideration if the execution of the written instrument is bargained for even though he is not asserting the claim or defense and believes that no valid claim or defense exists.

In most states, courts will not scrutinize the sufficiency or adequacy of consideration provided.<sup>13</sup> Given the weakness—if not frivolousness—of a legal claim based on invalidity or insufficiency of consideration, it seems likely that the persistence of this concern stems from the novelty of the real-world bargain made by the parties.

## Successors, Assigns, and Agents

While a CBA may be negotiated between community groups and a developer, a huge number of other parties may have responsibilities in implementing the CBA requirements. These would include the following:

New development entities that come into the project to work with, or replace, the original developer

- Parties to whom the original developer sells parcels of the property
- Management companies responsible for leasing, contracting, and other aspects of project operation
- Tenants renting space within the project
- Construction contractors or service contractors retained by developers, subsequent landowners, tenants, or other contractors**

From a legal perspective, some of these parties may be successors-in-interest, some may be assignees, some may be agents, and some may simply be parties to a relevant contractual relationship, like a service contract. There may be many “links” in the contractual “chain” between the parties to a CBA and the entity eventually charged with implementing certain CBA terms, like a custodial contractor retained by a tenant in the project. Requirements related to employment of workers in the project, like living-wage or local hiring policies, always present these issues and are usually among the highest priorities for community coalitions negotiating a CBA.

This situation is fraught with potential for difficulty in implementation of a CBA. Late-arriving parties like project employers may have responsibilities under a CBA, but none of them is likely to have a direct contractual relationship with the community groups. Since a CBA is negotiated before project approval, neither the identity of these many parties nor the particulars of the many contractual relationships will be known before CBA execution. None of these parties will have developed a working relationship with the signing community groups at the time they are asked to take on CBA responsibilities—and those community groups will already have performed their responsibilities under the CBA, before project approval, so parties coming into the project at a later date may have little need for continued community support.

It is therefore essential that CBAs contain clear language delineating which responsibilities flow to which entities, and what contractual steps are necessary on the part of the original developer to ensure that all relevant parties take on their obligations in an enforceable manner. Several existing CBAs contain detailed language in this regard.<sup>14</sup>

Unfortunately, the law is complex and at times unclear in this area, presenting challenging issues of legal drafting and eventual interpretation. Situations where an entity comes in as a formal successor to an original developer, as regards the entirety of the development, present the simplest situation; in such cases, general principles of successorship should be plainly applicable, and CBA benefits and burdens will clearly be transferred to the successor without express assumption necessary. In the many situations where complete successorship has not occurred—for example, sale of a single parcel in a large project, or assignment of certain development rights to a third party—legal analysis will be more complicated.

One especially difficult issue is determining when express assumption of a predecessor's obligation is necessary and when an assumption can be implied. Treatises and case law, even within a single state, are complex

and arguably conflicting.<sup>15</sup> Unsurprisingly, this area generates much litigation. Applying these principles of law to the implementation of a large development project involving multiple entities and many different types of contractual relationships will be challenging. To avoid conflict during implementation, CBAs should be drafted to require all relevant parties to expressly assume relevant responsibilities under the CBA at the time they become involved with a development project.

### Unincorporated Associations

Most CBAs have been negotiated by informal coalitions of community groups. Both the developer and community groups have incentive during negotiations to involve as many community groups as possible—the developer to broaden its community support, and the community groups to increase their leverage. Commentators have devoted some effort to discussing formal structures for coalitions negotiating CBAs, possibly involving incorporation.<sup>16</sup>

However, in virtually every CBA negotiation that has resulted in a signed agreement, the coalition of community groups has not been incorporated and has not established a formal voting or membership structure. Successful coalitions have typically aimed for consensus-based decision making and have allowed organizations to participate in varying ways as negotiations progress. Legally, these coalitions are usually considered unincorporated, nonprofit associations.<sup>17</sup>

Of course, regardless of coalition structure, the text of a CBA needs to specify which coalition members are parties and define their concomitant rights and responsibilities. While in most states an unincorporated association can enter into a contract, in practice it may be unclear whether and when legal responsibilities of unincorporated associations apply to their members. In California, for example, in most circumstances members of an unincorporated, nonprofit association are liable for contractual commitments of the association only when “[w]ith notice of the contract, the member receives a benefit under the contract.”<sup>18</sup> It is unclear how this statutory provision would apply to members of an unincorporated association signing a CBA, since the developer’s commitments usually benefit the community broadly rather than benefiting coalition members in a particular way.

Further, since membership standards for an unincorporated association are often uncertain, it may not even be clear against whom CBA responsibilities run and who can enforce the developer’s commitments. Given the scope of financial and practical commitments at issue in CBAs, and the lengthy implementation period, precisely defining rights and responsibilities is crucial. Most CBAs therefore do not include coalitions as a whole as parties, but rather include as parties solely the individual organizations comprising the coalition, even though they negotiated through a unified coalition structure. This approach avoids the legal uncertainty that would arise from utilizing an unincorporated association as a party.



## Ordinances Requiring CBAs

Some elected officials and community groups have expressed interest in passage of ordinances requiring CBAs. While this desire is a strong indication of the positive interest CBAs have generated, several issues make problematic the possibility of an ordinance requiring CBAs.

Most obvious is the question: With what community group or groups will the developer be required to negotiate a CBA? Any official designation by local government of a group or coalition as the preferred community representative will exclude other groups. This dynamic is clearly in tension with a main benefit of CBAs—the value of inclusiveness. Moreover, there is no guarantee that the government will select as the preferred community representatives groups that are strongly pressing for community benefits, as opposed to groups likely to facilitate project approval simply by agreeing to minimal benefits or unenforceable language. The New York City experience, described below, does not bode well in this regard.

Further, if the developer is actually *required* to enter into a CBA with a designated group or coalition, then the developer would have a strong argument that terms of the CBA were essentially requirements imposed by the government and thus subject to analysis under the takings clause and any other relevant restrictions on governmental action. For this reason, as well as for the political and practical reasons described above, it is preferable for local government to stay within its established role in the land use process: allowing the CBA approach to arise in an organic and flexible manner, where any party may attempt to come to the table, and allowing developers to enter CBA negotiations where they see them as beneficial.

Local governments wishing to facilitate community involvement in land use development have better options available. Several communities have required “community impact reports” or broad cost/benefit analyses before project approval.<sup>19</sup> These types of policies, providing the public a range of information on project benefits and impacts as well as an opportunity to weigh in publicly before project approval, promote inclusiveness, transparency, and informed, accountable decision making in major land use decisions.

## Political Context and the Role of Government

### Proactive Engagement and Coalition-Based Advocacy

Two important factors have fueled the interest in CBAs among community-based organizations. First is low-income neighborhoods’ newly receptive posture toward potential development in their communities. Negotiation of a CBA reflects a perspective on behalf of community-based organizations that is at least potentially pro-development. For community groups that are

simply opposed to a particular project, there is no value in participating in CBA negotiations; such negotiations make sense only for groups that are willing to support a project under certain conditions.

This proactive, optimistic engagement strategy has in many cases replaced a reactive, damage-control posture that has characterized community attitudes in many development controversies in past years. This paradigm shift in community perspective and engagement reflects both the strengths of the CBA model and a new recognition of the potential that redevelopment projects hold for revitalization of underserved urban neighborhoods.

A second factor fueling the interest in CBAs among community groups is the demonstrated success of a coalition-based approach to political and public advocacy regarding land use decisions. In the first several successful CBA negotiations, community groups formed semiformal coalitions and agreed to support or oppose projects in unison. For example, the coalition that negotiated the groundbreaking Staples CBA, the Figueroa Corridor Coalition for Economic Justice, had over 20 member organizations at various times. Despite the wide range of interests and viewpoints represented, the coalition remained cohesive. Members entered into the CBA and, with few exceptions, supported the project in unison. The coalition has remained active throughout years of implementing the Staples CBA and has been involved with many redevelopment issues affecting downtown Los Angeles.

The success of the coalition-based approach to advocacy is understandable. When a large number of prominent, engaged community advocates—representing interests as disparate as organized labor, environmental justice, affordable housing, and local employment—are working together through an organized coalition, it is difficult for elected officials and developers to ignore that unified voice. The widespread use of this strategy is clearly a factor in the spread of CBAs to cities around the country.

Of course, holding a coalition together poses substantial challenges for community groups. The central tenet of coalition-based advocacy in this context—that coalition members will support or oppose the proposed project in unison—can seriously conflict with the mission of any particular coalition member. Despite such challenges, the coalition-based approach is now standard procedure for community-based organizations interested in shaping large development projects, thus reflecting a widespread assessment of the political soundness of this approach. A strength of the CBA tool is that in a single instance, it is potentially adaptable to the needs of parties as diverse as the many members of a typical coalition—not to mention meeting the needs developers and public officials as well.

### Appropriate Role of Private Parties

Because the CBA concept is relatively new, and because this type of negotiation and advocacy can change power dynamics around development, some have alleged that this type of community involvement in the land use

development process is invalid or inappropriate. A typical characterization is that of New York City Mayor Michael Bloomberg, who complained that CBAs constitute community groups attempting to “grab something” from projects.<sup>20</sup>

Such complaints seem misguided because community groups have only one real source of leverage in CBA negotiations: their ability to publicly support or oppose a proposed project, generally through public hearings designed for the very purpose of receiving community input. Community groups are well within their rights to support a project only when conditions they feel are important are met (i.e., if the developer commits to providing certain benefits, and does so in a legally enforceable vehicle such as a CBA). Elected officials deciding whether a project should go forward obviously have the right, and many would say the duty, to consider the views of interested community members.

Of course, there is no guarantee that private community groups wanting to negotiate a CBA do in fact reflect the community. However, several real-world factors serve to minimize this concern. Only a broadly inclusive coalition, composed of organizations whose views carry some weight with governmental decision makers, is likely to have any success persuading a developer to negotiate with it. Elected officials presumably are unlikely to care about the views of unrepresentative, self-interested organizations. A CBA coalition has every incentive to bring in as many community interests as possible—again, to build leverage. When the CBA approach is used in an inclusive rather than an exclusive manner, fostering broader public understanding of and involvement in the land use process, concerns about the appropriateness of the approach are hard to support.

### Misuse of CBAs

Because the value of a CBA lies in its inclusiveness and accountability, CBAs that fall short in these areas rightly come in for criticism. CBAs negotiated in New York City have been widely disparaged by the public and the legal community, engendering controversy and criticism not evident among CBAs in other areas of the country.

These problems seem to have arisen due to the heavy-handed involvement of public officials. In the past few years, New York City has seen public officials

- set up a nominally private entity designated as the sole community representative for CBA negotiations;<sup>21</sup>
- act outside their official capacities to negotiate an unenforceable “community benefits agreement” for a project receiving a huge public subsidy;<sup>22</sup> and
- orchestrate a one-sided community benefits agreement between a developer and a coalition-in-name-only, composed of only three organizations, that reportedly had no independent legal representation in the negotiations.<sup>23</sup>

Each of these cases has come under extensive criticism. In each situation, governmental control over the CBA process acted to exclude and minimize the power of community groups and members of the public who were not brought in—and, not coincidentally, facilitated approval of the large, controversial projects in question.

This dynamic points to what should be a touchstone in any assessment of the validity or credibility of a CBA: the degree of community involvement leading to that agreement. While in any particular case the validity and degree of community involvement will be a matter of debate, scrutiny of this aspect of negotiations is essential to evaluation of any agreement touted as a CBA. An agreement that constitutes an attempt by developers and public officials to control public participation, occupying political space that might have been used for a more inclusive CBA effort, constitutes a misuse of the CBA approach and should not be taken as a valid indication of community support for a proposed project.

## Conclusion

Even aside from clear misuses of the CBA approach, CBAs are substantially limited as a long-term strategy for shaping economic development. CBAs are quite resource intensive for all parties, given that a lengthy negotiation governs only a single development project. In addition, CBAs generally address issues being presented by most large, urban multiuse projects in low-income areas: local hiring, job quality, environmental mitigations, levels of affordable housing, and so forth. Arguments presented by community advocates regarding the importance of these issues to their communities, and the need for government to subsidize only projects with positive impacts in these areas, apply similarly to many projects.

Rather than having all parties fight these battles on a project-by-project basis, a better solution would be to have local governments establish a slate of community benefits policies governing all large urban development projects, at least when subsidies are being provided. Local hiring policies, job quality requirements, environmental mitigations, and provision of affordable housing should be standard conditions of approval (or at least of subsidy) of large, multiuse projects in low-income urban areas. Such policies could set baseline standards while providing flexibility for unusual circumstances. Policy language generally should provide for enforcement through private causes of action, letting intended beneficiaries of community benefits policies enforce those policies, to minimize the enforcement burden on local government.<sup>24</sup> With the bulk of obvious issues handled through widely applicable policies, CBA negotiations could then be reserved for issues that are truly project specific: the desire of a community for open space or design changes in a project, for example, or the need for a grocery store or other particular community service at a certain location.

It is worth noting that if community advocates had confidence that public officials and their staff would more strongly consider community input in imposing community benefits requirements on developers, and would then enforce those requirements, we would not have seen the widespread interest in negotiation of private CBAs. In that sense, the interest in CBAs can only be taken as a criticism of urban land use development as practiced by local government to date. Hopefully, the issues raised by advocates of CBAs, their arguments as to what types of development projects should receive public support, and the newly engaged, positive attitude of low-income communities toward these projects, will lead to improved development processes and end results across the board, making CBAs less and less necessary over time.

## Resources

- Annie E. Casey Foundation. 2007. *Community benefits agreements: The power, practice, and promise of a responsible redevelopment tool*. Baltimore, MD.
- Baxamusa, Murtaza H. 2008. Empowering communities through deliberation: The model of community benefits agreements. *Journal of Planning Education & Research* 27:261–76.
- Beach, Benjamin. 2007–08. Strategies and lessons from the Los Angeles community benefits experience. *Journal of Affordable Housing & Community Development Law* 17(1–2):17–112.
- Bechtel, Debra A. 2007–08. Forming entities to negotiate community benefits agreements. *Journal of Affordable Housing & Community Development Law* 17(1–2):145–54.
- Cummings, Scott. 2007–08. The emergence of community benefits agreements. *Journal of Affordable Housing & Community Development Law* 17(1–2):5–6.
- Cummings, Scott. 2007–08. Mobilization lawyering: Community economic development in the Figueroa Corridor. *Journal of Affordable Housing & Community Development Law* 17(1–2):59–76.
- Gross, Julian. 2007–08. Community benefits agreements: Definitions, values, and legal enforceability. *Journal of Affordable Housing & Community Development Law* 17(1–2):35–58.
- Gross, Julian, with Madeline Janis and Greg LeRoy. 2005. "Community benefits agreements: Making development projects accountable." *Good Jobs First and the Partnership for Working Families*.
- Ho, William. 2007–08. Community benefits agreements: An evolution in public benefits negotiation processes. *Journal of Affordable Housing & Community Development Law* 17(1–2):7–34.
- Kaye, Laurie, and Jerilyn Lopez Mendoza. 2008. *Everybody wins: Lessons from negotiating community benefits agreements in Los Angeles*. New York: Environmental Defense.
- Leavitt, J. 2006. "Linking housing to community economic development with community benefits agreements: The case of the Figueroa Corridor

AU: Is this an article or a book? If article, more information is needed.

- Coalition for Economic Justice." In *Jobs and economic development in minority communities*, edited by P. Ong and A. Loukaitou-Sideris, 257–76. Philadelphia, PA: Temple University Press.
- LeRoy, Greg, and Anna Purinton. 2005. *Community benefits agreements: Ensuring that urban redevelopment benefits everyone*. Washington, D.C.: Neighborhood Funders Group.
- Marcello, David A. 2007. Community benefits agreements: New vehicle for investment in America's neighborhoods. *Urban Lawyer* 39(3):657.
- Meyerson, Harold. 2006. No justice, no growth: How Los Angeles is making big time developers create decent jobs. *American Prospect* 17(11):39.
- Mitnik, Pablo. 2008. *Cities and jobs: Local strategies for improving job quality and access*. Madison, WI: Center on Wisconsin Strategy.
- Parks, Virginia, Dorian Warren, and Margy Waller. 2008. *Community benefits agreements: Policy for the twenty-first century economy*. Washington, D.C.: The Mobility Agenda.
- Rigling Gallagher, Deborah, and Sarah E. Jackson. 2008. Promoting Community Involvement at Brownfield Sites in Socio-Economically Disadvantaged Neighborhoods. *Journal of Environmental Planning & Management* 51(5):615–30.
- Salkin, Patricia E. 2007. Community benefit agreements: Opportunities and traps for developers, municipalities and community organizations. *Planning & Environmental Law* 59(11).
- Salkin, Patricia E., and Amy Lavine. 2007. Negotiating for social justice and the promise of community benefits agreements: Case studies of current and developing agreements. *Journal of Affordable Housing* 17(1–2):113–44.
- Salkin, Patricia E., and Amy Lavine. 2008. Understanding community benefits agreements: Equitable development, social justice and other considerations for developers, municipalities and community organizations. *UCLA Journal of Environmental Law & Policy* 26.

## Notes

1. This CBA, entitled "Core Community Benefits Agreement" to reflect that it addresses only "core" community benefits issues, is available online at <http://communitybenefits.org/downloads/Bayview%20Hunters%20Point%20CBA.pdf> (last viewed Dec. 22, 2008).
2. See, e.g., J. Gross, *Community Benefits Agreements: Definitions, Values, and Legal Enforceability*, 17 J. AFFORDABLE HOUSING & COMM. ECON. DEV. L. 1–2, 59–76 [hereinafter Gross, *Definitions and Values*], and commentary cited therein; see also discussion of New York CBAs in Patricia Salkin & Amy Lavine, *Understanding Community Benefits Agreements, Equitable Development, Social Justice and Other Considerations for Developers, Municipalities and Community Organizations*, 26 UCLA J. ENV'TL L. & POL'Y [hereinafter Salkin & Lavine, *Understanding Community Benefits Agreements*].
3. See the preceding "Resources" section.
4. This article discusses only "private CBAs," i.e., private contracts meeting the above definition. Most of the interest in the legal aspects of CBAs concerns private

CBA, and the most prominent CBAs have been private CBAs. Gross, *Definitions and Values*, *supra* note 2, contains extensive discussion of “public CBAs,” *i.e.*, agreements that, like private CBAs, advance values of enforceability and inclusiveness in the development process but involve different types of contractual relations with a more central role for local government. Examples of public CBAs include the commitments related to the Cherokee-Gates Rubber redevelopment project in Denver, FRESC, <http://www.fresc.org/article.php?id=59> (last visited Feb. 17, 2009); the Yale Cancer Center project in New Haven, <http://www.communitybenefits.org/article.php?id=1284> (last visited Feb. 17, 2009); and the Oak-to-Ninth project in Oakland, <http://www.urbanstrategies.org/programs/econopp/oaktoninth.html> (last visited Feb. 17, 2009).

5. Several CBAs have also included labor peace requirements for both construction and nonconstruction jobs; the Staples CBA in Los Angeles, the Ballpark Village CBA in San Diego, and the Dearborn Street CBA in Seattle are examples. In the construction context, labor peace requirements are set forth in a project labor agreement requiring all project construction to occur under the terms of established collective bargaining agreements and ensuring that there will be no organized strikes or picketing by construction trades unions. For nonconstruction jobs, labor peace agreements usually contain provisions requiring employers to accept the “card check” method of validating union representation and to remain neutral regarding any unionization effort; in exchange, labor unions trying to organize the workplace agree to refrain from collective action such as picketing. Labor peace commitments are generally contained in a contract separate from the primary CBA and signed by relevant labor unions and the developer but are executed in conjunction with the primary CBA.

6. *E.g.*, Fairfax County (VA) Zoning Ordinance, pt. 2-800 *et seq.*, “Affordable Dwelling Unit Program” (inclusionary zoning ordinance); San Francisco Administrative Code, ch. 83, “First Source Hiring Program” (requiring local hiring on certain projects and contracts).

7. *E.g.*, the Atlanta Ordinance 05-O-1733 § 19 (regarding the Beltline Redevelopment Area Tax Allocation District) requiring that “capital projects that receive funding from TAD bond proceeds . . . reflect, through the development agreements or funding agreements that accompany such projects, certain community benefit principles, including but not limited to: prevailing wages for workers; a ‘first source’ hiring system to target job opportunities for residents of impacted low-income ‘BeltLine’ neighborhoods; establishment and usage of apprenticeship and pre-apprenticeship programs for workers of impacted BeltLine neighborhoods.” See also the slate of community benefits policies, enacted by resolution, to govern the Park East Redevelopment Corridor in Milwaukee in 2004, available at <http://www.communitybenefits.org/article.php?id=593> (last visited Dec. 23, 2008).

8. This chapter uses “development agreement” as shorthand for any legally binding contract between a local government entity and a developer, setting forth the terms on which the development may proceed and any contractual responsibilities of the local government, such as supportive infrastructure, public subsidies, permitting, etc. This definition includes owner participation agreements, disposition and development agreements, “incentive agreements,” and agreements entered into pursuant to a statutory scheme enabling a developer to obtain an early vested right to certain permits or approvals, *e.g.*, California Government Code § 65864 *et seq.*; Florida Statutes §§ 163.3220–163.3243.

9. See, e.g., the Columbia University "Memorandum of Understanding," discussed in detail in Gross, *Definitions and Values*, *supra* note 2.

10. See, e.g., the Bronx Terminal Market agreement, discussed in detail in Gross, *Definitions and Values*, *supra* note 2.

11. See, e.g., the Hollywood and Vine CBA, the Marlton Square CBA, and the Staples CBA, each described in Gross, *Making Development Projects Accountable*, available at <http://www.communitybenefits.org>.

12. See Salkin & Lavine, *Understanding Community Benefits Agreements*, *supra* note 2: "Chief among the questions as to validity of CBAs is whether community groups provide any real consideration for these contracts" (Salkin and Lavine ultimately conclude that a claim based on adequacy of consideration is likely to fail). See also public comment by William Valetta, former general counsel for the New York City planning department, at a New York City Bar Association panel on CBAs: "What is the community giving up in order to take part in the agreement? Presumably, they can't sell their vote on participation in a democracy." (reported in *The CBA at Atlantic Yards: But Is It Legal?*, N.Y. OBSERVER, Mar. 14, 2006).

13. See 2008 RESTATEMENT (SECOND) OF CONTRACTS § 79: "If the requirement of consideration is met, there is no additional requirement of . . . a gain, advantage, or benefit to the promisor, or a loss, disadvantage, or detriment to the promise . . . or equivalence in the values exchanged."

14. See, e.g., Dearborn Street CBA and Ballpark Village CBA, both available at <http://www.communitybenefits.org/legal> (last visited April 7, 2009).

15. Compare WILLIAM LINDSLEY, CALIFORNIA JURISPRUDENCE 3D ASSIGNMENTS § 18 (2008): "Where a bilateral contract expressly provides that its terms are to apply to and be binding on assigns, assignment of his or her contractual rights by one party also transfers that party's contractual burden, regardless of whether it is expressly assumed by the designee" (citing *Weidner v. Ziegler*, 218 Cal. 345 (1933); *Citizens Suburban Co. v. Rosemont Development Co.*, 244 Cal. App. 2d 666 (Cal. Ct. App. 1966); *Brady v. Fowler*, 45 Cal. App. 592 (Cal. Dist. Ct. App. 1920)) with B.E. WITKIN, SUMMARY OF CALIFORNIA LAW 10TH CONTRACTS § 740 (2005): "The assignee ordinarily does not become bound to perform the obligations of the assignor by a mere acceptance of the assignment. The assignee does become liable, however, by an express 'assumption' or promise to perform, made to the assignor, which is enforceable by the creditor as a third-party beneficiary."; and 29 RICHARD A. LORD, WILLISTON ON CONTRACTS § 74:35 (2008): "If an assignee of rights under a bilateral contract does not expressly assume the obligations of the assignor it becomes a question of interpretation whether the assignee impliedly promises to perform the duties under the contract."

16. See Debra A. Bechtel, *Forming Entities to Negotiate Community Benefits Agreements*, 17 J. AFFORDABLE HOUSING & COMM. ECON. DEV. L. 1-2, 145-54. The Public Law Center at Tulane University School of Law has released various materials for formalizing operations of CBA coalitions. See <http://www.law.tulane.edu/assets/0/260/262/F98F3712-C294-4730-8DFD-D9B73D264650.pdf> (last visited Dec. 23, 2008).

17. See, e.g., Cal. Corp. Code §§ 18020, 18035.

18. Cal. Corp. Code § 18610.

19. See policy requiring cost-benefit analysis of certain subsidized projects in San Jose, related documents available at <http://www.sanjoseca.gov/clerk/TaskForce/SRTF/SRTF.asp> (last visited Dec. 22, 2008). See also policies requiring impact analyses and conditional use permits for certain big-box retailers in California. E.g., Los Angeles Municipal Code § 12.24.U.14 *et seq.*; Inglewood Municipal Code § 12-95.5J; Karen



Holzmeister, *Alameda Supervisors Clear Way for Superstores*, OAKLAND TRIB., Mar. 16, 2006, available at <http://www.workingeastbay.org/article.php?id=66> (last visited Dec. 22, 2008).

20. See Terry Pristin, *In Major Projects, Agreeing Not to Disagree*, N.Y. TIMES, June 14, 2006, at C6. The article quotes the mayor as saying, "Every development project in this city is not going to be a horn of plenty for everybody else that wants to grab something." *Id.* See also a New York Post editorial deriding a call for a CBA as a "legal shakedown." Editorial, *Willeys Point Shakedown*, N.Y. Post, Nov. 13, 2008; and community advocacy characterized as "blackmail" in comments, available at <http://www.pittsburghcitypaper.ws/gyrobase/Content?oid=oid%3A33964> (last visited Dec. 22, 2008).

21. The nonprofit corporation established to negotiate community benefits regarding the Columbia University expansion; see discussion in Gross, *Definitions and Values*, *supra* note 2.

22. The unenforceable Yankee Stadium document entitled "Community Benefits Agreement"; see discussion in Gross, *Definitions and Values*, *supra* note 2.

23. The Bronx Terminal Market CBA; see discussion in Gross, *Definitions and Values*, *supra* note 2; see also CBA: Carrion's Benefit Agreement, <http://momandpopnyc.blogspot.com/2006/02/cba-carrions-benefit-agreement.html> (last visited Dec. 22, 2008).

24. See Gross, *Definitions, Values*, *supra* note 2, for a discussion of the many ways governmental enforcement of commitments in development agreements can fall short. Private enforcement mechanisms are already standard in certain community benefits policies, such as living-wage policies, prevailing-wage policies, and affordable housing requirements.

1 **BY COUNCIL MEMBER \_\_\_\_\_:**

2 **AN ORDINANCE** to amend Chapter 14 of the 1984 Detroit City Code,  
3 *Community Development*, by adding Article XII, titled *Community Benefits*, Section 14-  
4 12-1, to require Community Benefits Agreements for certain development projects

5 **IT IS HEREBY ORDAINED BY THE PEOPLE OF THE CITY OF DETROIT**

6 **THAT:**

7 Chapter 14 of the 1984 Detroit City Code, *Community Development*, Article XII,  
8 *Community Benefits*, read as follows:

9 **ARTICLE XII** Community Benefits

10 Sec. 14-12-1. Community Benefits Agreements.

11 It shall be the policy of the City of Detroit to require, wherever feasible,  
12 proportional community benefits as a condition of significant public support for  
13 development in the form of subsidies, tax abatements, below-market priced land or other  
14 enhanced public resources.

15 **Section 1.** A. For purposes of this Section, "Host Community" shall mean and  
16 include the community within the census tract(s) where the development project is physically  
17 located and may also include communities within adjacent census tracts that may be  
18 adversely affected by the activities of the development project, as determined either by  
19 agreement among members of the Host Community representative party to a Community  
20 Benefits Agreement, but shall in no case be smaller than the census tract where the  
21 development project is physically located.

22 B. For purposes of this Section, "First Source Hiring Program" shall mean a  
23 collaborative partnership between the developer, the City of Detroit and an appropriate  
24 workforce development agency, that to the extent consistent with federal and state law,

1 includes provisions to promote the hiring, training, and employability of residents and  
2 displaced workers from the Host Community, including both construction and permanent  
3 jobs in connection with a project.

4 C. For purposes of this Section, "Contractor" means any person, firm, partnership,  
5 limited liability company, corporation, joint venture, proprietorship, or other entity that  
6 enters into a contract for performance of construction work on the development project  
7 within the Host Community, including subcontractors of any tier.

8 D. The following standards and requirements shall apply to Community Benefits  
9 Agreements as a condition of public support for investments:

10 1) For any proposed development project in the City of Detroit that proposes  
11 public and/or private investment of Fifteen Million (\$15,000,000) Dollars or more, with  
12 either a) direct or indirect transfer of city-owned land parcels or other public property  
13 without open bidding or priced below market rates to the developer, as determined by the  
14 City Assessor or independent appraisal; or b) receipt of other forms of public subsidies by  
15 the developer, including but not limited to tax abatements or grants that are cumulatively  
16 valued as Three Hundred Thousand (\$300,000) Dollars or more, but not including  
17 Neighborhood Enterprise Zones, the developer shall engage Host Community residents  
18 for purposes of entering into a legally enforceable Community Benefits Agreement with  
19 representative residents, businesses and nonprofit organizations, collectively comprising  
20 the Host Community representative party to the agreement, to provide targeted benefits  
21 or appropriately negotiated employment opportunities, job training, low- and moderate-  
22 income housing, quality of life or environmental mitigations, neighborhood infrastructure  
23 and amenities, and community representation for the benefit of the Host Community in

1 the development and post-development processes, which shall approximate the value of  
2 the public support for the project, as required by this Section. Unless good cause is  
3 shown by a developer as provided in paragraph 1.F. of this Section, the Host Community  
4 representative and the developer for a project shall negotiate and execute a Community  
5 Benefits Agreement before the issuance of any project-related grants, tax abatements, or  
6 transfers of city owned land or property, or before other forms of subsidy are granted or  
7 awarded by the City of Detroit. Violation of this Section without good cause shown by a  
8 developer as provided in paragraph 1.F. of this Section, shall result in denial of approval  
9 for any such requested public land transfer and/or public subsidies.

10 2) For any proposed development project in the City of Detroit that proposes the  
11 public and/or private investment of more than Three Million (\$3,000,000) Dollars, but  
12 less than Fifteen Million (\$15,000,000) Dollars during the construction of facilities or  
13 plant, or to begin or expand operations or renovate structures, together with either of the  
14 following: a) direct or indirect transfer of city-owned land parcels or other public  
15 property without open bidding or priced below market rates to the developer, as  
16 determined by the City Assessor or independent appraisal; or b) receipt of other forms of  
17 public subsidies by the developer, including but not limited to tax abatements or grants  
18 that are cumulatively valued as Three Hundred Thousand (\$300,000) Dollars or more, the  
19 developer shall adopt and implement a First Source Hiring Program for residents of the  
20 Host Community, but shall not be required to provide any other community benefits  
21 referenced in Section D.1., as a mandatory condition precedent.

22 3) For any proposed development project in the City of Detroit that proposes the  
23 public and/or private investment of more than Three Million (\$3,000,000) Dollars during  
24 the construction of facilities or plant, together with either of the following: a) direct or

1 indirect transfer of city-owned land parcels or other public property without open bidding  
2 or priced below market rates to the developer, as determined by the City Assessor or  
3 independent appraisal; or b) receipt of other forms of public subsidies by the developer,  
4 including but not limited to tax abatements or grants that are cumulatively valued as  
5 Three Hundred Thousand (\$300,000) Dollars or more, that because of the nature of the  
6 development and/or the Host Community, is reasonably expected to produce  
7 disproportionately high and adverse human health or environmental impact, including  
8 social, esthetic, economic, physical, chemical, or biological impacts in the Host  
9 Community, Detroit City Council may determine that the requirements of Subsection  
10 D.1. shall apply, after a public hearing requested by a resident of the Host Community  
11 and duly noticed and conducted for the purpose of ascertaining whether or not the  
12 development project can reasonably be expected to produce any such impact, but not  
13 including Neighborhood Enterprise Zones.

14 E. Examples of community benefits or provisions that may be incorporated into a  
15 legally enforceable Community Benefits Agreement include, without limitation:

- 16 1. A First Source Hiring Program for residents of the Host Community;
- 17 2. A requirement that 51% of Contractors retained to provide services relating to  
18 the development project will consist of Detroit-based and Detroit-  
19 headquartered businesses (DBBs) and/or Emerging Small Business (ESBs)  
20 with less than One Million (\$1,000,000) Dollars in gross annual receipts; and  
21 50% of all such Contractors will be Detroit-headquartered businesses;
- 22 3. Workforce Development Programs:

- a. Where specialized technical training is necessary for employment in the developer's business, pre-apprenticeship, apprenticeship, and other training in the City's high schools, community colleges and workforce training programs, including but not limited to agencies such as the Detroit Registered Apprenticeship Program and the Access for All apprenticeship readiness programs targeting residents of the Host Community;
- b. One or more adult pre-apprenticeship programs operated by one or more qualified administrators or an administrative collaboration comprised of organizations that benefit residents of the Host Community, including but not limited to agencies such as the Partnership for Diversity and Opportunity in Transportation;
- c. Actively supporting workforce development activities that provide employment opportunities for residents of the Host Community, including but not limited to programs through federal workforce funds received annually and allocated by agencies such as the State's Michigan Works! partner, Detroit Employment Solutions Corporation or another appropriate workforce development agency or entity ;
- d. Providing annual Contractor readiness training for Detroit-based small businesses, through the United States Department of Transportation Bonding Education Program or other relevant training opportunities;

- 1 e. Hosting annual Contractor information and networking sessions about  
2 upcoming contracting opportunities with MDOT in the City of Detroit;  
3 and

4 4. Youth Employment Programs:

- 5 a. Programs to require Contractors, subcontractors and developers to hire  
6 City youths in the Host Community, including but not limited to  
7 agencies such as Transportation and Civil Engineering (TRAC)  
8 summer internship positions to qualified Detroit youths;
- 9 b. Providing program materials, training and support for Detroit Public  
10 Schools/CTE (DPS) or other educational institutions in the Host  
11 Community;
- 12 c. Providing employment and career mentoring opportunities for youths  
13 who reside in the Host Community, including but not limited to  
14 MDOT's Youth Development and Mentoring Program;

15 5. Land Use Programs:

- 16 a. Actively promoting City real estate and investment opportunities in the  
17 Host Community through agencies such as the Michigan Prospectus or  
18 another appropriate real estate investment agency or entity;
- 19 b. Providing additional recreational opportunities, parks, educational  
20 services, environmental amenities, housing capacity or other benefits  
21 in the Host Community;
- 22 c. Providing funds for demolition of abandoned residential homes in the  
23 Host Community;

- 1           6. Provisions that require periodic reporting, the frequency to be determined by the  
2           parties, of activities and ongoing monitoring of compliance by the parties  
3           throughout the course of the project;
- 4           7. Provisions that require the parties to periodically meet and confer, the frequency  
5           to be determined by the parties, and disclose the parties' activities and the status  
6           of compliance to Host Community residents, and that require periodic public  
7           meetings with the opportunity for input and comments by Host Community  
8           stakeholders;
- 9           8. A community needs assessment regarding the Host Community at the developer's  
10          expense;
- 11          9. An environmental and/or public health assessment of the impacts of the proposed  
12          development at the developer's expense; and/or
- 13          10. Specified remedies for violation of the Community Benefits Agreement,  
14          which unless otherwise agreed by the parties, may include, without limitation liquidated  
15          damages, claw backs, or revocation or withdrawal of tax abatement and public subsidies,  
16          either directly by the City of Detroit, or by application to the Michigan Tax Tribunal, as  
17          provided by law.

18           F. The developer may request, from the City Council, an exemption from the  
19          requirement of entering a Community Benefits Agreement where it can demonstrate that:

20           (1) Identifying a Host Community representative to negotiate with on behalf of  
21          the Host Community is infeasible or impractical; or

22           (2) Good faith negotiations have occurred for a reasonable time period, but  
23          negotiations have reached an intractable impasse; or



1 (3) Other exigencies make entering a Community Benefits Agreement infeasible  
2 in the particular instance.

3 To request an exemption, the developer shall set forth in writing the basis of its  
4 request and document how it will otherwise seek to implement the intent of this Section  
5 to provide the Host Community with benefits from the development.

6 G. The terms a Community Benefits Agreement under this Section shall be  
7 incorporated into the development agreement, if any, between the City of Detroit and the  
8 developer of the project. Integration of the terms of the Community Benefits Agreement  
9 into any such development agreements shall not change, alter or diminish the legal and  
10 equitable duties, rights, and remedies of the parties to the Community Benefits  
11 Agreement, and nothing in any such development agreement shall preclude, prevent, or  
12 otherwise limit the Host Community representative party or its successors from having  
13 standing to enforce a Community Benefits Agreement. .

14 H. All City of Detroit Executive Branch Departments, Divisions and Agencies  
15 involved in economic development projects or activities, as well as the Detroit Economic  
16 Growth Corporation, shall provide a copy of this ordinance to each potential developer,  
17 upon first contact regarding any particular economic development project proposal, to  
18 provide the developer with notice of the requirements of this Section.

19 **Section 2.** All ordinances, or parts of ordinances, that conflict with this  
20 ordinance are repealed.

21 **Section 3.** This ordinance is hereby declared necessary to preserve the public  
22 peace, health, safety, and welfare of the People of the City of Detroit.

1           **Section 4.** In the event that this ordinance is passed by a two-thirds (2/3) majority  
2 of the City Council Members serving, it shall be given immediate effect and become  
3 effective upon publication in accordance with Section 4-116 of the 1997 Detroit City  
4 Charter. Where this ordinance is passed by less than two-thirds (2/3) majority of the City  
5 Council Members serving, it shall become effective no later than thirty (30) days after  
6 enactment in accordance with Section 4-115 of the 1997 Detroit City Charter.

7 Approved as to form:

8

9

---

10 Corporation Counsel